Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

R.A. BARTON; J.R. BARTON; J.R. BARTON, JR.; and BLAKE BARTON,
Petitioners,

v.

AMERICAN RED CROSS and EOLINE MCGOWAN, M.D.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the appeals court erred in affirming the district court order (a) holding that expert testimony was required in this case and that the expert offered by the Bartons did not qualify as such, and (b) granting summary judgment in favor of the Defendants as to the Bartons' claim that the blood testing and donor screening procedures in this case violated the applicable standard of care.

2. Whether the appeals court erred in affirming the district court order refusing to provide adequate time in which to locate the donor of the blood in this case and by failing to compel testimony.

3. Whether the appeals court erred in affirming the district court order granting summary judgment in favor of Defendant/Appellee the Red Cross as to the Bartons' claim that the Defendants were negligent and/or wanton is delaying lookback notification for six months in this case.

4. Whether the appeals court erred in affirming the district court order granting summary judgment in favor of the Red Cross as to the Bartons' claim that the Defendants fraudulently suppressed from the Plaintiffs the information that the blood donor in this case was HIV-positive and whether such conduct constituted outrageous conduct.

5. Whether the appeals court erred in affirming the district court order in its decisions to strike the Bartons' claim for punitive damages and demand for jury trial on the basis that the Red Cross was a federal instrumentality entitled to sovereign immunity, and to dismiss all claims but one against Defendant/Appellant Dr. McGowan, on the grounds that she was entitled to federal official immunity.

PARTIES, PARENT COMPANIES AND SUBSIDIARIES

In compliance with Supreme Court Rule 14(b), the Petitioners represent that the parties to this petition are all named in the caption of this case. To the knowledge of the Petitioners, there are no parent companies or non-wholly owned subsidiaries with an interest in the case.

Southeast Alabama Medical Center and Dr. John P. Moore were initially made parties Defendant, but they were dismissed and are no longer parties.

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REFERENCE TO REPORTS OF OPINIONS

The unpublished decision of the United States Court of Appeals for the Eleventh Circuit in two cases was entered on December 16, 1994 (App. 1a), and the order denying rehearing and rehearing en banc was entered on March 23, 1995. (App. 68a). Decisions of the United States District Court for the Middle District of Alabama in the case are reported at 826 F. Supp. 407 (M.D. Ala. 1993), 826 F. Supp. 412 (M.D. Ala. 1993), and 829 F. Supp. 1290 (M.D Ala. 1993.)

CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

The judgment or order of the United States Court of Appeals for the Eleventh Circuit being reviewed is dated December 16, 1994. (App. 1a), and that Court denied rehearing and rehearing en banc on March 23, 1994. (App. 68a).

The statutory provision conferring jurisdiction upon this Court to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. § 1254(1). Supreme Court Rule 10 of the Supreme Court Rules provides for review of a court of appeals decision when the decision has (a) "so far departed from the accepted and usual cause of judicial proceedings, or sanctioned such a departure by a lower court, as to call for this Court's power of supervision," or when the court of appeals (b) "has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflict with applicable decisions of this court".

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, with just compensation.

United States Constitution, Amendment XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

36 U.S.C. § 2:

The name of this corporation shall be "The American National Red Cross", and by that name it shall have perpetual succession, with the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States; to have and to hold such real and personal estate as shall be deemed advisable and to dispose of the same, to accept gifts, devises, and bequests of real and personal estate for the purposes of this corporation hereinafter set forth; to adopt a seal and the same to alter and destroy at pleasure; and to have the right to have and to use, in carrying out its purposes hereinafter designated, as an emblem and badge, a Greek red cross on a white ground, as the same has been described in the treaties of Geneva, August twenty-second, eighteen hundred and sixty-four and July twenty-seventh, nineteen hundred and twenty-nine, and adopted by the several nations acceding thereto; to ordain and establish by-laws and regulations not inconsistent with the laws of the United States of America or any state thereof, and generally to do all such acts and things as may be necessary to carry into effect the provisions of this act and promote the purposes of said organization; and the corporation hereby created is designated as the organization which is authorized to act in matters of relief under said treaties. In accordance with the said treaties, the delivery of the brassard allowed for individuals neutralized in time of war shall be left to military authority.

Ala. Code 1975, § 6-5-542(2):

(2) Standard of Care. The standard of care is that level of such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice, ordinarily have and exercise in like cases. A breach of the standard of care is the failure by a health care provider to comply with the standard of care, which failure proximately causes personal injury or wrongful death. This definition applies to all actions for injuries or damages or wrongful death whether in contract or tort and whether based on intentional or unintentional conduct.

Ala. Code 1975, § 6-5-548:

(a) In any action for injury or damages or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care the plaintiff shall have the burden of proving by substantial evidence that the health care provider failed to exercise such reasonable care, skill and diligence as other similarly situated health care providers in the same general line of practice, ordinarily have and exercise in a like case.

(b) If the health care provider whose breach of the standard of care is claimed to have created the cause of action is not certified by an appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist, a "similarly situated health care provider" is one who:

(1) Is licensed by the appropriate regulatory board or agency of this or some other state; and

(2) Is trained and experienced in the same discipline or school of practice; and

(3) Has practiced in the same discipline or school of practice during the year preceding the date that the alleged breach of the standard of care occurred.

(c) If the health care provider whose breach of the standard of care is claimed to have created the cause of action is certified by an appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a "similarly situated health care provider" is one who:

(1) Is licensed by the appropriate regulatory board or agency of this or some other state; and

(2) Is trained and experienced in the same speciality; and

(3) Is certified by an appropriate American board in the same speciality; and

(4) Has practiced in this specialty during the year preceding the date that the alleged breach of the standard of care occurred.

(d) No evidence shall be admitted or received, whether of a substantive nature or for impeachment purposes, concerning the medical liability insurance, or medical insurance carrier, or any interest in an insurer that insures medical or other professional liability, or any witness presenting testimony as a "similarly situated health care provider" under the provisions of this section or of any defendant.

(e) The purpose of this section is to establish a relative standard of care for health care providers. A health care provider may testify as an expert witness in any action for injury or damages against another health care provider based on a breach of the standard of care only if he is a "similarly situated health care provider" as defined above.

STATEMENT OF THE CASE

A. Course of Proceedings and Dispositions in the Court Below

Plaintiff/Appellant R. A. Barton ("Becky Barton") filed her original complaint in this case in the state court in July 1991, against Defendants the Red Cross and its Alabama Director, Dr. Eoline McGowan, alleging that Becky Barton had been infected with HIV virus as the result of a transfusion with blood obtained from a donor who was negligently and wantonly screened and which blood was negligently and wantonly tested. The complaint was amended to add as Plaintiffs Becky's husband, J. R. Barton, Sr., and her sons, J. R. Barton, Jr., and Blake Barton, and to allege claims of loss of consortium on behalf of her husband and children.

In August 1991, the Red Cross and Dr. McGowan removed the case to the United States District Court for the Middle District of Alabama,[1] asserting the defense of sovereign immunity and the statute of limitations. (App. 58a). The Defendants moved for a temporary stay of discovery on the merits and a protective order, which was granted by the Court, except that the parties were granted leave to conduct discovery as to the statute of limitations issue. Thereafter, the Defendants filed a motion for summary judgment which was denied with respect to the pertinent issues here. (App. 60a).

The Bartons' amended the complaint to allege fraudulent suppression for a period of approximately 6 months, by the Defendants of the information that the donor of the blood transfused into Becky Barton was infected

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[1] Pursuant to 36 U.S.C.A. § 2, the federal district courts have orriginal jurisdiction over all cases to which the Red Cross is a party. *See American National Red Cross v. S.G.*, 505 U.S. ——, 112 S. Ct. 2465, 120 L.Ed.2d 201 (1992).

with the HIV virus, and also alleging that the aforesaid suppression constituted actionable outrageous conduct. (App. 6a).

In December 1992, the district court granted a motion to strike the Bartons' claim for punitive damages. (App. 67a).

In December 1992, the Bartons filed a motion to compel answers to interrogatories and responses to requests for production in which they sought court intervention for the first time in their efforts to obtain discovery from the unidentified donor of the blood transfused into Becky Barton. Said motion was denied without prejudice with instructions from the district court that the Bartons attempt to obtain the requested information from other sources. On February 3, 1993, the Bartons renewed their motion to compel discovery from the donor, alleging that they had deposed other witnesses regarding the screening procedures applied by Red Cross as instructed by the court, but had not been able to obtain the necessary information. (App. 49a). Said motion was set for oral argument and heard on March 1, 1993. This issue was taken under advisement by the magistrate judge.

In January 1993, the Defendants had filed another motion for summary judgment, which was taken under advisement along with the supporting and opposing submissions.

In February 1993, the Red Cross filed a motion to strike the Barton's demand for a jury trial, and in March, Dr. McGowan filed a motion to dismiss all claims against her, or in the alternative, to strike the Bartons' claim for punitive damages and demand for jury trial as to her. (App. 34a; 50a).

On June 29, the district court issued an order granting the Red Cross' motion to strike the Bartons' jury demand, which was vacated on July 7 and a revised order issued (App. 50a). On July 9, the district court issued a final judgment and memorandum opinion in which it granted Defendants' motion for summary judgment in full as to both parties. (App. 43a). The court also issued an order denying as moot the Bartons' motion to compel discovery from the blood donor. (App. 48a).

The Bartons filed a motion to alter, amend, or vacate the court's judgment on July 23, based in part upon the court's entry of summary judgment prior to ruling on the Bartons' motion to compel discovery from the blood donor. (App. 72a). The court issued an order on August 17 referring the donor discovery issue back to the magistrate judge and continuing the submission of the Bartons' motion to alter, amend, or vacate to allow them to submit additional discovery and briefs. (App. 72a). Thereafter, the magistrate judge entered an order granting the Bartons' motion and appointing attorneys for the unidentified donor. (App. 72a). The attorneys for the parties developed a list of written interrogatories to be propounded to the donor, and the attorneys appointed to represent her began efforts to locate her. When the initial efforts proved unsuccessful, the Bartons requested and were granted extensions of the discovery deadlines by the court in order to allow time for additional attempts by the attorneys to locate the donor while maintaining the confidential nature of her identity. (App. 73a). On November 22, the magistrate judge issued a recommendation that the Bartons' motion to alter, amend, or vacate the judgment be denied. (App. 72a). On December 15, the district court entered an order adopting the magistrate judge's recommendation, overruling the Bartons' objections thereto, and denying the motion to alter, amend, or vacate the final judgment. (App. 70a).

The Bartons filed a timely notice of appeal to the United States Court of Appeals for the Eleventh Circuit on December 27. That court's jurisdiction was posited under 28 U.S.C. § 1291. The Barton's also sought permissive appeal of the punitive damages and jury trial issues, under 28 U.S.C. § 1292(b), which was granted by the Eleventh Circuit.

B. Statement of the Facts

In June 1988, a 25-year-old woman donated blood to the Red Cross at a donor site in Montgomery, Alabama. (App. 4a). After collecting the donor's blood, the Red Cross tested it for HIV using an initial screening test known as an "ELISA" test. The blood tested negative for HIV and was sent out for use in transfusions. It is possible, however, for a screening test to fail to detect the presence of HIV in blood if the donor is tested within a brief "window period" which occurs between infection with HIV and the time in which antibodies become detectable in the blood upon testing. (App. 4a-5a). In July 1988, Becky Barton was given a blood transfusion with blood provided by the Red Cross from the donor referred to above.

In June 1990, the same donor again gave blood to the Red Cross. The Red Cross again tested the donated blood using the ELISA test, but on this occasion, the blood tested positive for HIV. The Red Cross subsequently conducted a procedure known as "lookback" to determine whether the donor had previously given blood and, if so, to whom the blood had been given. The hospital supplying the transfusion to Becky Barton was not notified of the donor's HIV-positive status until December 13, 1990. *Id.* The hospital then contacted the physician who treated Becky Barton in 1988, and he notified her on January 3, 1991, of the possibility that she had received HIV infected blood in the transfusion. Mrs. Barton took an initial ELISA test, the results of which were

positive for HIV, following which the positive results were confirmed by a Western Blot. (App. 5a). Mrs. Barton is married, has two children living at home, and prior to her notification that she was infected with the HIV virus, taught third grade in Andalusia, Alabama. (App. 58a).

In February or March 1992, the Bartons learned for the first time through discovery of the Red Cross' six-month delay in informing them of the blood donor's HIV-positive status and the Red Cross' position that it has no duty to so inform recipients, but does so only on a voluntary basis, and shortly thereafter, they amended their complaint to add claims for fraudulent suppression and outrageous conduct. (App. 6a).

REASONS FOR GRANTING THE PETITION

I. SCREENING AND TESTING PROCEDURES

Applying Alabama's Medical Liability Act, *Ala. Code*, §§ 6-5-480, 6-5-540-552 ("the AMLA") the district court has held that "the Bartons must show that the actions of [the Defendants] were not in accordance with those of similarly situated blood collectors at the time of the challenged action" (App. 6a), and that such showing can only be made through the testimony of an expert witness who is a "similarly situated health care provider" (App. 11a). The trial court further found that the only exception to this rule was where "an understanding of . . . lack of due care or skill requires only common knowledge or experience." (App. 16a).

The liberal application of the "common knowledge or experience" rule is mandated by a large body of law, both state and federal, that rejects industry practice as an unalterably required standard of care. In *Texas v. Pacific Ry. Co. v. Behymer*, 189 U.S. 468 (1903), Justice Holmes eloquently said: "What usually is done may be evidence of what ought to be done, but what ought to be

done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." Similarly, in *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932), Judge Learned Hand rejected an argument that the absence of radio receivers on tugboats was acceptable industry practice and therefore established a standard of care for all tugboats as follows:

> "Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; *a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.*"

(emphasis added). Alabama courts have uniformly adhered to this same principle. See *Alabama Power Co. v. Robinson*, 404 So.2d 22 (Ala. 1981), (rejecting a jury charge given in the trial court describing electric utility company's duty as using and following practices generally recognized as safe and prudent by other electric utility companies).

It defies reason to assume that the Alabama Legislature intended to reject this time-honored rule of constitutional significance and completely replace it with a standard of care that left a determination of culpability entirely in the hands of the blood bank community.

The "common knowledge or experience" rule applies and expert testimony is not required, where a foreign substance is left in a patient's body, or where the injury complained of is not connected to the condition for which the plaintiff sought treatment. *Allred v. Shirley*, 598 So.2d 1347, 1350 (Ala. 1992). In this case, negligence was established because a foreign substance, the HIV virus, was permitted, "through the absence of requisite care, diligence or skill, to remain in the body" of the plaintiff. *Sellers v. Noah*, 209 Ala. 103, 105, 95 So. 167

(1923). See Also, *Riase v. Wood*, 540 So.2d 646 (Ala. 1988). The "common knowledge and experience" rule should also apply here because the injury sustained was in no way connected to the reason the patient originally sought treatment-for gastrointestinal bleeding. The trial court's decision in this regard is erroneous because duties become greater as the likelihood of serious damage increases (*Industrial Chem. & Fiberglass Corp. v. Chandler*, 547 So.2d 812 [Ala. 1988]), and in view of the fact that the infusion of HIV-contaminated blood results in certain death, and in view of Red Cross' own position that the risk is so great that it will not even accept a transfusion *recipient's* blood for six months after he or she received a transfusion.

If the AMLA standards also govern the claims regarding Red Cross' refusal to notify Ms. Barton of her peril, the "common knowledge or experience" rule would also apply to that facet of the case. The emotional pain and suffering that she felt as a result of Red Cross' callous indifferences to her ignorance of her condition bore no relationship whatsoever to the reason she initially sought treatment.

A. Expert Testimony Requirements

Under the AMLA, expert testimony of a "similarly situated health care provider" is generally necessary to establish a violation of the applicable standard of care owed by a defendant professional entity to a plaintiff unless the violation is so obvious that a reasonable person can see it. *Watson, Watson & Rutland v. Board of Education*, 559 So.2d 168, 173 (Ala. 1990). The exception has been made in Alabama for cases in which an understanding of the professional's lack of due care or skill requires only common knowledge or experience applies to this provision, also. *Plitt v. Griggs*, 585 So. 2d 1317, 1325 (Ala. 1991). The district court concluded without explanation that whether the Red Cross' blood testing and donor

screen procedures met the standard of care is not an issue that is an exception to the general rule. The Bartons contend that the district court was in error in so concluding and that the violations of the standard of care herein are of the type which are so obvious that a reasonable person can ascertain them.

Common knowledge in this case confirms that the devastating results of error command that duties regarding blood collection be placed at the highest level. *Chandler*, 547 So.2d at 812. The Defendants' chief witness, testified that the ELISA test produced from 6 to 10 "false positive" results for every true positive result and that, because of the sensitivity of the test, retesting would not improve performance. The evidence showed, however, that blood from 26 donors that had previously tested positive went through a re-test on June 26, 1988, and that 25 of the 26 re-tested as negative. If there is a given ratio of 6:1 to 10:1 false positive to true positive, then logic would dictate that at least one or two more of the "false positive" in that batch were likely "true positive," or that something was seriously amiss with the testing procedure.

As to the screening procedures, the screening questions do not place a person who is heterosexually promiscuous among those persons who are "at risk," even though, as the trial court noted, the Red Cross' official in charge of blood services in 1991 testified that a female donor who "went home with a different man every right" should have been cautioned by Red Cross that she may be at risk of contracting HIV. (App. 18a-19a). The same official also testified that a female was several times more likely to contract the HIV virus from a male heterosexual partner than a male would be to contract it from a female. Figures released by the Center for Disease Control indicate that AIDS cases resulting from heterosexual contact increased 17.1 percent in 1992, as opposed to a 1 percent increase from tainted needles.

The trial court noted in its memorandum opinion that Dr. Paul V. Holland, a witness for Red Cross, testified that:

> "[H]eterosexual promiscuity has never been a high risk category for AIDS as defined by the Public Health Services and that, even today, blood collectors do not ask questions about heterosexual promiscuity."

(App. 19a). According to all the other evidence available in this case, common knowledge is all that is needed for one to conclude that retesting and screening for heterosexual promiscuity are *necessary* steps in the process of collecting blood.

Assuming, arguendo, that expert testimony is required in this case, then the Bartons contend that the district court was in error in holding that their expert, Irving R. Schwartz, M.D., was not qualified to testify as an expert in this case against the Red Cross. Expert medical testimony under the AMLA must be furnished by a "similarly situated health care provider." Under the criteria established in § 6-5-548(b) of the AMLA, the similarly situated health care provider who may provide expert testimony against an entity such as the Red Cross is one who is licensed by an appropriate regulatory board or agency, is experienced in the same discipline or school of practice, and has practiced in the same discipline or school of practice during the year preceding the date that the alleged breach of the standard of care occurred. An exact match of specialties is not possible here, and is not required, although the expert witness should have approximately the same level of specialization. *Medlin v. Crosby*, 583 So.2d 1290, 1295 (Ala. 1991).

Dr. Schwartz meets the requirements of § 6-5-548(b), and is competent to offer expert testimony against the Red Cross. Dr. Schwartz is the Director of the Outpatient Blood Services Department at Albert Einstein Medical Center in Philadelphia, Pennsylvania and has worked extensively in the field of hematology. As the Di-

rector of Outpatient Blood Services, Dr. Schwartz is involved with the distribution of blood products for transfusion into patients at his hospital and he is acutely aware of the need to make sure the blood he distributes has met all appropriate standards to insure the safety and well-being of the patients who will receive it, and is, therefore, well aware of said standards. In addition, Dr. Schwartz is a member of blood banking organizations, and is on the Medical Advisory Committee for the Delaware Valley Regional Blood Center of the American Red Cross, from which his hospital receives the blood it utilizes. Dr. Schwartz practiced in the field of blood banking during the year immediately preceding Becky Barton's transfusion. He is also familiar with the lookback procedures conducted by the Red Cross.

The district court found that, although Dr. Schwartz had some experience and training in certain aspects of blood banking, he did not qualify as a similarly situated health care provider because he did not have experience and training in the specific type of blood collection, processing, and distribution involved in this litigation. (App. 16a). The Supreme Court of Alabama has held, in a case interpreting an earlier version of the AMLA, that even if the defendant and the expert are in different schools of practice, the witness may be still be competent to testify about those standards regarding which the principles of the schools do or should concur. *Wozny v. Godsil*, 474 So.2d 1078, 1087 (Ala. 1985). That same standard should be applied here.

II. STANDARD OF CARE FOR DONOR SCREENING AND BLOOD TESTING

As Becky Barton's illness clearly evidences, the presence of the HIV virus in the blood of the donor which she received in transfusion went undetected at the time of the donation and subsequent transfusion to Mrs. Barton. There are two possibilities which explain why this tragedy occurred. One is that Mrs. Barton was so unfortunate

as to receive blood which was donated by a female donor who did not realize that she was at risk for AIDS during the "window period" in which the donor was already infected with HIV but before antibodies were present in the blood which could be detected by ELISA testing. This is a remote possibility and a rare occurrence. The other is that something went wrong with the screening procedure, the testing procedure, or the way in which the testing and screening were administered. The Bartons contend that the Defendants violated the requisite standard of care in two ways. First, they contend that the Defendants failed to adequately screen the donor of the infected blood before her blood was collected. Second, they contend that the Defendants failed to adequately test the donated blood for infection before releasing it for transfusion.

During the interview screening process, specific questions should be asked of a prospective donor and the donor should be required to read a pamphlet entitled "What You Must Know Before Giving Blood." The purpose of the screening questions and pamphlet is to advise a donor whether he or she is at risk for AIDS and certain other conditions and that a donor should not give blood if he or she is at risk. "At risk" individuals are described as persons who have engaged in the following conduct since 1977: men who have had sex with another man, persons using illegal drugs by needle, natives of Haiti and certain African countries, hemophiliacs who have taken clotting factor concentrates, persons who have had a positive test for AIDS, persons who have AIDS or its symptoms,[2] persons who have had sex with anyone de-

[2] The symptoms of AIDS are described by the pamphlet as unexplained weight loss of 10 pounds or more in less than 2 months, night sweats, blue or purple spots under the skin, long lasting white spots or unusual sores in the mouth, lumps in the neck, armpits, or groin lasting longer than a month, fever higher than 99 degrees lasting longer than 10 days, and diarrhea that lasts longer than a month.

scribed in the pamphlet, prostitutes (male or female), men who have had sex with a female prostitute, and women who have had sex with a male prostitute. In *Kirkendall v. Harbor Ins. Co.*, 698 F. Supp. 768 (W.D. Ark. 1988), the court noted that, as early as May 18, 1983, it was suggested that screening questions of donors should include advice that sexual partners of those at risk were also at risk. By 1988, however, the screening process utilized by the Defendants did not, nor does it now, include advice that a donor who has been sexually promiscuous is at risk, as is the sexual partner of someone who is or has been sexually promiscuous.

Witnesses for both sides, including Red Cross officials, acknowledged that the addition of such criteria to the list of screening questions would be desirable and that it was conceivable that such a question could have affected the outcome of this particular case. Red Cross officials admitted that the screening process should advise that a sexually promiscuous woman donor was at risk and that the sexual histories of donors would not be inappropriate to ask during screening.

The American Association of Blood Banks publishes "Standards for Blood Banks and Transfusion Services," the document which the Defendants maintain sets forth the appropriate standard of care in this case ("the AABB Standards"). Section B1.263 of the AABB Standards requires that "[a]ll donors must be given educational materials informing them of the high risk groups or activities for AIDS and that persons at risk for AIDS should refrain from donating blood." While some such information is included in the educational material, prospective donors were never informed that sexual promiscuity, or heterosexual contacts with another person who was sexually promiscuous, placed the donor at a high risk of infection. Such failure clearly constituted a breach of the Defendants' duty in this case.

The Bartons also presented sufficient evidence to the district court regarding failures of the Alabama Region of the Red Cross to adhere to its own documented screening procedures to establish a question of material fact. On May 25, 1988, about a month before the donor gave the infected blood in this case, representatives of the Food and Drug Administration ("FDA") criticized the Alabama Region after noting that seven of eight donors observed at an Alabama collection site were not given the requisite pamphlet, and that the donors observed were not asked if they read and understood the pamphlet or the consent statement on the donor form. The FDA also reported that on November 19, 1987, a donor answered affirmatively to a screening question involving hepatitis, but no further investigation was conducted. In November of 1988, the FDA noted that two 1988 donors who had previously self-excluded did not self-exclude in 1988 and that the blood was processed and shipped, apparently ignoring deferral procedures.

Turning to the failure to adequately test donated blood for infection before releasing it for transfusion, the Bartons submit that they offered sufficient evidence in opposition to summary judgment to establish a material question of fact. Dr. Schwartz's deposition was replete with questions about the reliability of the testing processes around the time of the donor's June 1988 donation. The day the donor's blood was tested on June 23, 1988, the tube containing her blood was only three rack spaces from Unit No. 41LG32575, which tested positive for the HIV virus at that time, and Dr. Schwartz expressed concern about the possible juxtaposition of those tubes. Dr. Schwartz also expressed concern that there were seven previously positive samples that were retested in the same batch as the blood of Becky Barton's donor, and that the high number of retests on that day caused him to wonder what was happening and to question the reliability of the testing as it was done at that time due

to the inconsistent results. According to Dr. Holland, Unit No. 41LG32575 was confirmed positive for HIV by a Western Blot test performed at the Red Cross' national headquarters on July 25. When Unit No. 41LG-32575 was retested in duplicate on June 26, the samples from a total of 26 donors were tested in duplicate at the same time. Although all had previously tested positive on the ELISA test, of the 26 donors, 25 retested negative on June 26. Since Dr. Schwartz had been concerned about the incorrect results on the previous tests of seven units, it is more than obvious that he would have been overwhelmed to learn that three days later it had been necessary to retest more than three times that many, and that 25 of the 26 retests had revealed results different from the results obtained on the first tests.

According to one Red Cross employee, the practice in the Alabama region of the Red Cross, consistent with the test kit manufacturer's instructions, was to run one preliminary ELISA test as soon as possible after collecting the blood.

If that test was negative, the blood was used in the blood service system. If that first test was positive, however, two other duplicative tests were run. If both of the duplicative tests were negative, the blood was used. If either of the two duplicate test results were positive, the blood was destroyed and a sample sent to another laboratory to have the confirmatory Western Blot test run. Even though there were a total of 32 blood donors whose blood was tested inconsistently with the ELISA test from June 23 to June 26, 1988, no substantial reason was given for not running more than one ELISA test initially. The Red Cross simply followed the manufacturers' instructions.

The testimony of the Defendants' witnesses is widely varying absent the question of the reliability of the first ELISA test. Some say that an initial positive ELISA

test can be easily unreliable, while others imply that an initial positive is virtually conclusive as to the use of the blood. If negative results can follow positive results, there is certainly no reason that can be given why a follow-up of a negative test might not produce a positive result. The test cost is minimal, and it is difficult to imagine why more initial ELISA testing is not employed after an initial negative ELISA result.

Adding significantly to the evidence of negligence and recklessness in this case is the fact that the operation of the regional blood service out of the Birmingham office was in a state of virtual chaos during the time relevant to all of the issues in this case. One Red Cross official in the blood services unit in Birmingham testified that she repeatedly complained to her supervisor that she did not have sufficient staff to adequately perform her functions. Dr. McGowan was terminated from her position as medical director of the Red Cross Alabama Regional Blood Bank in November 1990 after serving for 22 years in that position. The letter of termination advised her that it was necessary that the Red Cross implement more aggressive efforts and achieve more substantial results in dealing with the issues raised in the recent FDA inspections. A Red Cross official testified that he fired Dr. McGowan because she created a dangerous situation by resuming a higher level of blood testing activity in the regional laboratory than the national headquarters had allowed her to do, and that she did so without notification to the national headquarters or FDA.

Inspection reports from the FDA concerning the Alabama Regional Blood Bank were submitted to the district court in opposition to the Defendants' motions for summary judgment. These and earlier FDA inspection reports regarding the Alabama region indicate that instances of noncompliance with FDA regulations were occurring regularly at the Alabama regional headquarters, so much so that a meeting by FDA officials with Alabama

Red Cross officials regarding a plan for bringing the area back into compliance was necessary.

Section B5.510 of the AABB Standards provides that a sample of blood "from each donation shall be tested for . . . anti HIV. Whole blood and blood components shall not be used for transfusion unless the tests are non-reactive." The Red Cross has admitted that it does not comply with this standard. The Red Cross is using blood that tests positive on a first test every time that it can get two follow-up negative results. Thus, Red Cross is not following the standard prohibiting the use of blood for transfusion unless the tests (specified in the plural) are nonreactive.

III. DONOR DISCOVERY

The Circuit Courts of Appeal have been sharply divided upon the question of discovery from a blood donor in cases such as this. See, e.g., *Watson v. Lowcountry Red Cross*, 974 F.2d 482 (4th Cir. 1992); *Coleman v. American Red Cross*, 979 F.2d 1135 (6th Cir. 1992). The lower federal courts are strongly divided upon the issue of donor discovery as they struggle to balance the interests of plaintiffs, donors, the blood-banking industry, and the public. *See Estate of Hoyle v. American Red Cross*, 149 F.R.D. 215 (D. Utah. 1993); *Long v. American Red Cross*, 145 F.R.D. 658 (S.D. Ohio 1993); *Sampson v American National Red Cross*, 139 F.R.D. 95 (N.D. Tex. 1991).

In December 1992, the Bartons filed a motion to allow them to obtain limited and confidential discovery from the donor of the blood that was transfused into Becky Barton. Upon instruction from the court, they attempted to obtain this information from other sources, but could not, whereupon they again requested the court to allow donor discovery. That motion remained pending from March 1, 1993, until the time that summary judgment was entered on July 9, 1993 with no response from the

court except to deny it as moot when summary judgment was entered. (App. 48a-49a). Donor discovery was crucial in this case because the donor is the only person who is capable of providing evidence that could have affected both the question of whether the donation could have been made during the window period and whether appropriate screening procedures were used prior to her donation. The Bartons' inability to at least question the donor severely hampered their case and deprived the court of evidence that could have been of assistance to it in deciding certain of the issues, especially that of the care utilized in the screening process. Nevertheless, the Bartons were not accorded a ruling on their motion until after they filed a motion to alter, amend, or vacate summary judgment in this case.

By the time discovery was finally allowed in September 1993, efforts to locate the donor produced no results. The donors' attorneys did ultimately locate a relative of the donor who indicated she had infrequent contact with the donor. Shortly after this relative was located, the court issued orders concluding discovery in this case and entering final judgment denying the Bartons' motion to alter, amend, or vacate, even though holidays were approaching, providing a time when relatives are likely to communicate.

Surely, after the inordinate delay in responding to the Bartons' request for discovery rulings, which increased the difficulty of finding the donor, the court could have allowed additional time in which these efforts might have been intensified. The magistrate judge found that the law does not grant litigants unlimited time for discovery, and concluded that it was pure speculation to assert that more time would yield evidence compelling a different result. The Bartons assert that the law does not deny a reasonable time for discovery, and that a closure of efforts within a short time after a significant lead was found was not reasonable.

IV. CONDUCT OF LOOKBACK PROCEDURES

The Bartons maintain that the chaotic conditions and instances of noncompliance in the Alabama Region noted by the FDA indicate the presence of a material issue of fact regarding whether these conditions proximately contributed to the delay by the Defendants in notifying the Bartons of Becky Barton's exposure to the HIV virus during the lookback procedure.

V. FRAUDULENT SUPPRESSION AND OUTRAGEOUS CONDUCT

The Bartons contend that the Red Cross fraudulently suppressed from them the fact that Becky Barton had been exposed to HIV-infected blood for a six-month period, and that its conduct in disclaiming any duty to inform her amounted to outrageous conduct.[3] Mrs. Barton's donor gave blood a second time to the Red Cross in 1990, when she tested positive. Six months later Red Cross notified the transfusing hospital that one of its transfusion recipients had received blood from an infected donor in 1988. In its order granting summary judgment, the district court found that the Bartons had met each element required to establish their claim for fraudulent suppression under Alabama law. (App. 31a). The court found that the Red Cross did have a duty to disclose the facts to the Bartons, that it had failed to disclose this essential information, and that the Bartons had raised a genuine issue of material fact as to their reliance to their detriment on the Red Cross' notification delay and their injuries as a result thereof. (App. 31a-33a). In reaching this conclusion, the trial court said: "*The Red Cross asserts that it had no duty to warn Mrs.*

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[3] The Supreme Court of Alabama recognized the intentional or reckless tort of outrageous conduct causing severe emotional distress in *American Road Serv. Co. v. Inman*, 394 So.2d 361, 365 (Ala. 1980), in which it held that willful wrongs, or those so reckless as to be willful, authorized recovery in damages for the mental suffering caused thereby. *See also, Green Tree Acceptance v. Standridge*, 565 So.2d 38, 44 (Ala. 1990).

Barton of potential danger because no confidential relationship existed between the Red Cross and Mrs. Barton." (App. 28a-29a) (Emphasis added). In rejecting that position, the court stated:

> The particular undisclosed fact here, the donor's HIV-positive status, was a tremendous value to Mrs. Barton. Not only did the knowledge affect Mrs. Barton's own health but it also affected her behavior toward her family, especially her husband, and her students. Without the knowledge that she was possibly HIV-positive, she unwittingly put her family and students at risk of becoming infected as well. Thus, the particular fact here did not merely concern the monteary value of merchandise but the lives of numerous individuals.
>
> . . .
>
> The relative knowledge of the parties also points heavily toward finding a duty of disclose. Mrs. Barton had no way of knowing that the donor had tested positive. The only other point at which Mrs. Barton would have discovered the need for an HIV test would have been once she showed the symptoms of having HIV, a point which could be too late to extend her life or to prevent transmission to others. Thus, all of the facts were within the Red Cross's knowledge.

(App. 29a-30a).

It is clear that, if there is a viable action in existence to redress outrageous conduct, the unbelievably callous attitude of Red Cross in taking the position it has taken fully justifies its application here. Nevertheless, the court granted summary judgment in favor of the Defendants because it found that the Bartons had not presented any evidence regarding what period of time would have been reasonable or violative of the standard of care in the industry pertaining to lookback procedures. The Bartons maintain that they did present evidence from not only their expert witness, but also expert witnesses from the Red Cross, that a six-month delay in notifying the re-

cipient of HIV-contaminated blood that she could be at risk for AIDS is far too long and violative of any appropriate standard of care.

The witnesses essentially agreed that the delay in this case was inordinate and that time standards should have been imposed by Red Cross in virtue of the devastating effects that delay could cause. The district court cited an FDA investigation report which indicates that a four-month notification delay for donors may be too long. (App. 28a). Surely, if such a delay in notifying an affected donor is unreasonable, an equal or greater delay in notifying an affected recipient is also unreasonable. Furthermore, given the Defendants' position that they had no obligation whatsoever to make the Plaintiffs aware of the knowledge about the HIV-infected donor which they possessed, it is apparent that the Defendants acknowledged no urgency whatsoever in notification, and could ostensibly taken even longer than they did in this case to share such information with a potentially affected blood transfusion recipient. Despite the official position of the American Red Cross that lookback is not a duty, Red Cross officials knew that the procedures are morally obligatory.

The Plaintiffs do not agree that their claim for fraudulent suppression of material information should be characterized as medical malpractice. Assuming *arguendo* that it should be, however, the Plaintiffs point out that the very withholding of material facts is a breach of the duty undertaken by a medical provider to safeguard the interests of those receiving the provided care, and constitutes actionable fraud. *Johnson v. McMurray*, 461 So. 2d 775, 778 (Ala. 1984). (Policy considerations dictating a confidential nature in a doctor-patient relationship are grounded upon the necessity for each to fully disclose certain essential information to the other). Surely if the Defendants are medical providers covered by the Alabama Medical Liability Act, they must also assume obligations imposed upon such providers.

The witnesses agreed that the purpose of the lookback procedure is to identify recipients of blood donated by persons later found to be HIV-positive so that such recipients, if alive, can be counselled about measures to prevent the spread of infection and can seek appropriate medical care. The extended failure and refusal to impart such knowledge to any blood transfusion recipient by any supplier of blood products must certainly be a clearly apparent violation of any reasonable standard of care, and cannot be condoned.

Fraudulent concealment may be the basis for a medical malpractice cause of action. *Trammer v. Bernstein*, 596 So. 2d 572, 574 (Ala. 1991); *Johnson*, 461 So.2d at 775. The district court found that the Bartons' claim of fraudulent suppression was in substance a challenge to medical procedures in the form of a claim for negligence in conducting the lookback and notification process. The Bartons disagree. Had the Red Cross suppressed information regarding its screening and testing procedures, for example, which affected the blood supplied for transfusion into Becky Barton, such suppression might indeed be properly labeled medical malpractice, since those procedures led to Mrs. Barton's infection. In the case of the lookback procedures, however, medical procedures are not at issue. The lookback process is an administrative one that tracks donors found to have infected blood products to see whether there is any potential that they have exposed others to infection in the past, and if so, that notifies the affected recipients.

The Bartons contend that they submitted substantial evidence to manifest to the district court that a material issue of fact existed regarding each of the elements of the tort of outrage. Regardless of the intentions of the Defendants, any delay over and above that absolutely necessary to obtain confirmation of the positive HIV status of the 1988 donor on her subsequent donation in 1990 was sufficiently reckless as to be outrageous, especially

when it is coupled with the Defendants' claim that *they had no duty whatsoever to advise Becky Barton of her exposure.*

The district court noted that the Red Cross has no time limits in its policy guidelines for conducting lookbacks and notifications, and that the lack of guidelines suggests that a six-month delay was not outrageous. The Bartons must disagree, and respectfully suggest that the lack of guidelines mandating time limits for this critical procedure supports their argument that the conduct of the Defendants was itself outrageous. Surely no more is required for a finding that the Defendants have committed the tort of outrageous conduct.

VI. SOVEREIGN AND OFFICIAL IMMUNITY

The trial court held that the status of Red Cross as a federal instrumentality entitled it to sovereign immunity from suit except to the extent that such immunity had been waived by the "sue and be sued" provision in its creating legislation, 36 U.S.C. § 2. After examining precedent in the field, the district court found that Red Cross was exempt from jury trials and from liability for punitive damages, and that its Alabama blood bank supervisor, Dr. Eoline McGowan was entitled to official immunity. (App. 35a; 50a; 58a).

Although the court had held that "sue and be sued" waivers should be liberally construed (*Federal Housing Admin. v. Burr*, 309 U.S. 242 (1940)), lower courts are in a state of discord as to whether organizations like the Red Cross can be subjected to jury trials and to punitive damages, particularly in view of this Court's holding in *American National Red Cross v. S.G., supra.* A government instrumentality does not acquire the government's immunity simply because it performs governmental functions. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939) *See also, Algernon Blair Indus. v. Tennessee Valley Authority*, 552 F. Supp. 972 (M.D. Ala. 1982).

Red Cross has made no dispositive showing to defeat the presumption that Congress intended to fully waive sovereign immunity, and the courts below erred in limiting the "sue and be sued" provision included in the Red Cross charter. Similarly, the official immunity protection of Dr. McGowan is entertained with that issue.

CONCLUSION

For the foregoing reasons, the petitioner requests that this Honorable Court grant this petition for writ of certiorari.

Respectfully submitted,

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Dated: June 21, 1995

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 93-7105 & 94-6135

D.C. Docket No. CV-91-T-1001-S

R.A. BARTON; J.R. BARTON, SR.;
J.R. BARTON, JR.; BLAKE BARTON,
Plaintiffs-Appellants,

versus

AMERICAN RED CROSS, a corporation,
EOLINE MCGOWAN, an individual,
Defendants-Appellees,

SOUTHEAST ALABAMA MEDICAL CENTER,
a corporation; JOHN P. MOORE, JR., M.D.,
an individual,
Defendants.

Appeals from the United States District Court
for the Middle District of Alabama

(December 16, 1994)

Before KRAVITCH, Circuit Judge, GODBOLD and RONEY, Senior Circuit Judges.

PER CURIAM:

AFFIRMED on the basis of the following Orders of the District Court:

Order dated February 25, 1993, 826 F.Supp. 407 (M.D. Ala. 1993);

Order dated July 7, 1993, 826 F.Supp. 412 (M.D. Ala. 1993);

Order dated July 9, 1993, 829 F.Supp. 1290 (M.D. Ala. 1993).

[Filed Jul. 9, 1993]

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 91-T-1001-S

R. A. BARTON, *et al.*,
Plaintiffs,

v.

AMERICAN RED CROSS, *et al.*,
Defendants.

MEMORANDUM OPINION

Plaintiffs, R.A. Barton and her husband and two sons, have brought this lawsuit claiming that defendants, the American Red Cross and Eoline McGowan, M.D., negligently and wantonly failed to screen properly for HIV-infected blood that was given to Mrs. Barton in a transfusion. The Bartons rest their claim on the Alabama Medical Liability Act (AMLA), Ala. Code 1975 §§ 6-5-480 to -488, 6-5-540 to -552. The Bartons also charge the defendants with fraudulently suppressing for six months the knowledge that the blood donor had tested HIV-positive on a subsequent donation. In addition, the Bartons charge the defendants with the tort of outrageous conduct for failing to disclose the donor's HIV-positive status. The Red Cross and Dr. McGowan, who was the medical director for the Red Cross in Alabama at the time of Mrs. Barton's transfusion, move for summary judgment on all of the Bartons' claims. Dr. McGowan also moves to dismiss all claims against her based on official immunity, or in the alternative, to strike the

Bartons' jury demand and claims for punitive damages against her.[1] For the reasons set forth below, the Red Cross's and Dr. McGowan's motions for summary judgment are granted and Dr. McGowan's motion to dismiss is denied in part and granted in part.

I. MOTIONS FOR SUMMARY JUDGMENT

As stated, the Red Cross and Dr. McGowan contend that they are entitled to summary judgment on all claims. Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." A district court must consider "all the evidence in the light most favorable to the non-moving party . . . and resolve all reasonable doubts in favor of the non-moving party." *Earley v. Champion International Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990) (citations omitted).

A. Background

In June 1988, a 25-year-old female donated blood to the Red Cross. She completed a medical history questionnaire and was given a brief examination. The donor read a pamphlet describing individuals who were considered to be at high risk of getting AIDS and she indicated in writing that she understood the pamphlet. She also indicated that she was not in any high risk group. After collecting the donor's blood, the Red Cross tested it for HIV using an initial screening test known as an "ELISA" test, and the blood tested negative. The blood was sent out for use in transfusions even though it is possible for the presence of HIV not to appear in a

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[1] Pursuant to 36 U.S.C.A. 2, the federal courts have original jurisdiction over all cases to which the Red Cross is a party. *See American National Red Cross v. S.G.*, —— U.S. ——, ——, 112 S.Ct. 2465, 2472 (1992).

blood test if the donor is tested within a six month "window period" of being infected with HIV. In July 1988, the Southeast Alabama Medical Center in Dothan, Alabama admitted Mrs. Barton for treatment by Dr. John P. Moore, Jr. The hospital gave Mrs. Barton a transfusion with the blood taken from the donor provided by the Red Cross. The Red Cross kept a record of which hospital had received the blood but received no information as to the identity of the ultimate recipient.

In June 1990, the same donor again gave blood to the Red Cross. On June 9, the Red Cross tested the donor's blood using the initial ELISA test. The blood tested positive for HIV. The Red Cross sent the blood to another laboratory for a confirmatory test and received the results, which were positive, in August 1990. Subsequently, the Red Cross conducted a "look-back" to determine whether the donor had previously given blood and, if so, to identify the recipient hospital. It is unclear when the Red Cross began this procedure. After the Red Cross ultimately conducted the look-back, it notified the Medical Center of the donor's HIV status on December 13, 1990.

On January 3, 1991, Dr. Moore passed the information on to Mrs. Barton, who took an HIV test. In January, Mrs. Barton learned that the results of her initial test and confirmatory test were positive, though the parties dispute the exact date on which she was informed of her confirmatory test results. In July 1991, Mrs. Barton filed this lawsuit against the Red Cross and Dr. McGowan, who was the medical director for the Red Cross in Alabama at the time of Mrs. Barton's transfusion; she claimed that these two defendants were negligent and wanton in screening the donor's blood.[2] She amended her complaint to add claims for loss of

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[2] Dr. Moore and the Southeast Alabama Medical Center were also named as defendants but were later dismissed. *Barton v. American Red Cross (Barton II)*, —— F.Supp. —— (M.D. Ala. February 25, 1993).

consortium by her husband and loss of services by her sons.

In February or March 1992, the Bartons learned for the first time of the Red Cross's delay in informing Mrs. Barton of the blood donor's HIV-positive status. The Bartons amended their complaint to add claims of fraudulent suppression and the tort of outrage based on the delay.

B. Standard of Care

As the court has previously found, the Bartons' negligence claims are governed by the AMLA. *Barton v. American Red Cross (Barton I)*, 804 F. Supp. 1455, 1457 (M.D. Ala. 1992); *cf. Bradway v. American National Red Cross*, 992 F.2d 298, 300 (11th Cir. 1993) (under Georgia law, action against Red Cross for negligent collection and supply of blood is governed by Georgia medical malpractice law). The AMLA provides that the "standard of care is that level of such reasonable care, skill and diligence as other similarly situated health care providers in the same general line of practice, ordinarily have and exercise in like cases." Ala. Code 1975 § 6-5-542(2). With this standard, the AMLA "establish[es] a *relative standard of care* for health care providers." § 6-5-548(e) (emphasis added). Thus, the Bartons must show that the actions of the Red Cross and Dr. McGowan were not in accordance with those of similarly situated blood collects at the time of the challenged actions.

The Bartons contend that simply meeting a relative standard of care—that is, the level of care exercised by other health care providers—is insufficient when reasonable prudence dictates that stricter requirements should be met, even if no other health care providers meet those requirements. In support of their contention, the Bartons erroneously rely on negligence cases that are not based on the AMLA. *See, e.g., The T.J. Hooper*, 60 F.2d 737,

740 (2d Cir.), *cert. denied,* 287 U.S. 662, 53 SCt. 220 (1932). Their contention is also contrary to the language of the AMLA and Alabama case law. The Alabama Supreme Court, in construing the 1975 version of the AMLA, held that the "legal duty imposed upon physicians is to exercise the degree of reasonable care, diligence, and skill that reasonably competent physicians in the national medical community would ordinarily exercise when acting in the same or similar circumstances." *Bates v. Meyer,* 565 So.2d 134, 136 (Ala. 1990). Although the later, 1987 supplementary version of the AMLA, under which the Bartons bring their claims, has a new standard-of-care provision, § 6-5-542(2), the language is almost identical to the standard-of-care provision in § 6-5-484(a) of the 1975 version. The Bartons have not shown that the new provision altered the previous requirement that the standard of care be measured against that of the national medical community. In fact, the Alabama Supreme Court has continued to cite with approval cases construing the standard of care under the 1975 version. *See, e.g., Brooks v. Goldhammer,* 608 So.2d 394, 395 (Ala. 1992) (citing *Bates*).

The Bartons argue that interpreting § 6-5-542(2) as requiring only a relative standard of care "would subject the section to severe constitutional attacks" under both the federal and Alabama constitutions but fail to assert that the statute is in fact unconstitutional. Nevertheless, the court will briefly address the Bartons' apparent constitutional contentions. The Bartons contend that § 6-5-542(2) violates the equal protection clause of the fourteenth amendment to the United States Constitution and the equal protection provisions of the Alabama Constitution of 1901, §§ 1, 6, and 22 of Article I. In *Plitt v. Griggs,* 585 So.2d 1317, 1324-25 (Ala. 1991), the Alabama Supreme Court rejected a similar attack on the constitutionality of § 6-5-548, which sets out the burden of proof and defines who is a "similarly situated health

care provider" within § 6-5-542(2)'s definition of the standard of care. Like the Bartons, the plaintiff in *Plitt* argued that, because the provisions of § 6-5-548 apply only to medical malpractice actions, the statute imposes a restriction on medical malpractice plaintiffs not imposed on other types of plaintiffs. *Id.* at 1324.

A statute, such as the AMLA's relative standard provision, that does not interfere with a fundamental right or discriminate against a suspect class will ordinarily survive an equal protection attack based on the federal constitution so long as the challenged classification is rationally related to a legitimate governmental purpose. *See, e.g., Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 457-58, 108 S.Ct. 2481, 2487 (1988). Applying the rational basis test to the equal protection challenge under the federal constitution, the court in *Plitt* found that § 6-5-548's establishment of a relative standard of care for health care providers is rationally related to a proper governmental purpose. 585 So.2d at 1324. Because this court agrees with *Plitt*'s analysis of § 6-5-548 and because §§ 6-5-548 and 6-5-542(2) serve the same end, it follows that the provisions in § 6-5-542(2) are also rationally related to a proper governmental purpose. In addition, the Alabama Supreme Court held that its analysis of the equal protection issue under the federal constitution was equally applicable to the state constitution. *Id.* at 1325. Thus, the Bartons' equal protection claims under both federal and state law are without merit.

The Bartons also argue that § 6-5-542(2) violates § 13 of Article I of the state constitution because it is an unreasonable, arbitrary, and oppressive modification of a fundamental right. The Bartons, however, have failed to identify what fundamental right the statute modifies or how the statute is unreasonable in light of the Alabama Supreme Court's finding that the establishment of a relative standard of care is rationally related to a proper

governmental purpose. Relying on *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1972), and *United States of Dep't of Agriculture v. Murry*, 413 U.S. 508, 93 S.Ct. 2832 (1973), the Bartons assert that § 6-5-542(2) constitutes an "irrational irrebuttable presumption" in violation of the due process clause of the fourteenth amendment to the United States Constitution. While the Bartons do not define what presumption is irrebuttable, the court assumes that the Bartons are claiming that the statute prevents them from establishing their claim using an ordinary standard of care. However, reasonable restraints on how a party may establish its civil claim and marshal its evidence in support of that claim, in the manner that § 6-5-542(2) seeks to do, are not condemnable as constitutionally impermissible irrebuttable presumptions. Finally, the Bartons suggest that the statute is subject to a vagueness challenge but they fail to explain how a relative standard of care is any more vague than the standard of care in a negligence case not brought under the AMLA. Section 6-5-542(2) is not unconstitutionally vague. Accordingly, the court finds that all of the Bartons' constitutional challenges to § 6-5-542(2) are meritless.

C. Expert Testimony Requirement

The Red Cross and Dr. McGowan contend that they are entitled to summary judgment because the Bartons have failed to satisfy the AMLA's requirements regarding expert testimony. Subsection (e) to § 6-5-548 of the AMLA provides that "A health care provider may testify as an expert witness in any action for injury or damages against another health care provider based on a breach of the standard of care only if he is a 'similarly situated health care provider.'" The Bartons contend, however, that whether a witness is competent to testify in a federal trial is a procedural issue controlled by federal rather than state law and that therefore subsection (e) does not apply in this lawsuit. According to the Bartons,

Rule 702 of the Federal Rules of Evidence, which provides the standard for the admission of expert testimony in general, should apply. The Bartons are incorrect.

Rule 601 of the Federal Rules of Evidence provides that, "in civil actions and proceedings, with respect to an element of a claim or a defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law." This proviso means, in general, that state law governs the competency of a witness where the proof is directed at a substantive issue governed by state law. Charles A. Wright and Victor J. Gold, 27 Federal Practice and Procedure § 6007 at 78-79 (1990); James Wm. Moore and Helen I. Bendix, 10 Moore's Federal Practice § 601.06 at VI-22 (2d ed. 1993). Because Alabama supplies the rule of decision or substantive law for the issues now before this court—that is, whether the Red Cross and Dr. McGowan are liable for medical malpractice—Alabama law also governs the competency of witnesses to testify as experts regarding those issues. Admittedly, the jurisdictional basis for this litigation is a federal law governing the operation of the Red Cross, 36 U.S.C.A. §§ 1, et seq. *See American National Red Cross v. S.G.*, —— U.S. ——, 112 S.Ct. 2465, 2472 (1992). However, the focus of Rule 601 is not on the basis for federal jurisdiction but rather on the source of the applicable substantive law. Federal Practice and Procedure § 6007 at 72-76; Moore's Federal Practice § 601.06 at VI-22. Here, because that source is state law—that is, the AMLA—the state's companion laws governing competency apply as well. Section 6-5-548, the AMLA's provisions governing expert witnesses, therefore applies to this federal lawsuit. *See Ralph v. Nagy*, 749 F. Supp. 169, 172-73 (M.D. Tenn. 1990) (under Rule 601, Tennessee statute requiring medical expert witness in medical malpractice case to be licensed in Tennessee applied rather than Fed. R. Evid. 702), *aff'd on other grounds*, 950 F.2d 326 (6th Cir. 1991); *Crumley v. Memorial Hospital, Inc.*, 509 F. Supp. 531,

532 n. 2 (E.D. Tenn. 1978), *aff'd*, 647 F.2d 164 (6th Cir. 1981) (same); *Denton v. United States*, 731 F. Supp. 1034, 1036 (D. Kan. 1990) (applying Kansas expert witness statute under Rule 601 rather than Rule 702).

As stated, subsection (e) to § 6-5-548 provides that a health care provider may testify as an expert witness in litigation against another health care provider only if the witness is a "similarly situated health care provider." The critical question then is when can a witness be considered a "similarly situated health care provider." Subsection (c) to § 6-5-548 offers one scenario: if the defendant health care provider holds himself or herself out as a specialist, is "certified by an appropriate American board as a specialist," and "is trained and experienced in a medical specialty," then a witness would be considered similarly situated, and thus competent to offer medical testimony, only if he or she is "certified by an appropriate American board in the same specialty" as the defendant and has "practiced in this specialty during the year preceding the date that the alleged breach of the standard of care occurred." [3]

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[3] Subsection (c) to § 6-5-548 provides in full:

> "If the health care provider whose breach of the standard of care is claimed to have created the cause of action is certified by an appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a 'similarly situated health care provider' is one who:
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> (1) Is licensed by the appropriate regulatory board or agency of this or some other state; and
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> (2) Is trained and experienced in the same specialty; and
>
> (3) Is certified by an appropriate American board in the same specialty; and
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> (4) Has practiced in this specialty during the year preceding the date that the alleged breach of the standard of care occurred."

Although the opening paragraph of § 6-5-548(c) uses the conjunctive "or" in describing the type of defendant covered by the sec-

Dr. McGowan is certified by the American Board of Pathology in Anatomical and Clinic Pathology and Blood Banking, is trained and experienced in the specialty of blood banking, and holds herself out as a specialist in blood banking. The Bartons' expert witness, Dr. Irving R. Schwartz, is certified in internal medicine rather than in blood banking.[4] In addition, Dr. Schwartz has been director of outpatient blood services at a medical center since 1986 but was not involved in the collection of blood in that position other than collecting patients' own blood for later transfusion into the patients themselves. Dr. Schwartz had previously been the director of the medical center's blood bank laboratory but left that position in 1986. Thus, as to Dr. McGowan, Dr. Schwartz does not meet the requirements of a "similarly situated health care provider" under subsection (c) of § 6-5-548. He is not certified in the same specialty as Dr. McGowan and did not practice in the specialty of blood collection and processing in the year preceding 1988 through 1991, the dates of the alleged negligent and wanton acts.

The Red Cross similarly contends that Dr. Schwartz does not qualify as a "similarly situated health care provider" under subsection (c). The Bartons maintain that subsection (c) does not apply to the Red Cross because it is impossible for an entity to be board certified. Instead, the Bartons argue that subsection (b) to § 6-5-548 applies. Under subsection (b), if the defendant is not board certified as a specialist or is not trained and experienced in a medical specialty, a witness may offer expert testimony only if he or she is "trained and experi-

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tion, the Alabama Supreme Court has interpreted the "or" as "and"; thus, for § 6-5-548(c) to apply, the defendant must meet all the requirements of the opening paragraph. *Medlin v. Crosby*, 583 So.2d 1290, 1294-96 (Ala. 1991).

[4] The Red Cross does not dispute that Dr. Schwartz meets § 6-5-548(c)(1)'s general licensing requirement. Dr. Schwartz is licensed by the State of Pennsylvania as a physician.

enced in the same discipline or school of practice" as the defendant and has "practiced in the same discipline or school of practice" during the year prior to the alleged negligent act.[5]

Relying on *Wilson v. American Red Cross*, 600 So.2d 216, 218-219 (Ala. 1992), the Red Cross responds that the Alabama Supreme Court has already held that the Red Cross, acting through its physicians, should be treated as a "professional" under the AMLA. *Wilson*, however, did not address whether subsection (b) or (c) of § 6-5-548 applied to the Red Cross. Simply because the Red Cross is a "professional" does not mean that it is the equivalent of being board certified in a specialty. Furthermore, the Red Cross's physicians are presumably board certified in a number of different specialties. It is doubtful that the Alabama legislature intended that a plaintiff would be required to provide an expert who is board certified in all of the specialties covered by Red Cross physicians.

Nevertheless, the AMLA is clear in its application to non-individuals such as the Red Cross, and the Alabama Supreme Court so held in *Wilson*. Sections 6-5-481 and 6-5-542 provide that the "health care providers" covered by the AMLA include "medical institutions" and "pro-

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[5] Subsection (b) to § 6-5-548 provides in full:

> "If the health care provider whose breach of the standard of care is claimed to have created the cause of action is not certified by an appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist, a 'similarly situated health care provider' is one who:
>
> (1) Is licensed by the appropriate regulatory board or agency of this or some other state; and
>
> (2) Is trained and experienced in the same discipline or school of practice; and
>
> (3) Has practiced in the same discipline or school of practice during the year preceding the date that the alleged breach of the standard of care occurred."

fessional corporations." The AMLA is not so clear, however, as to how § 6-5-548, the provisions governing expert witnesses, should be applied when the defendant is a non-individual. A common sense review of § 6-5-548 leads to, at least, one reasonable application.

Subsections (b) and (c), when read in conjunction with subsection (e), limit admissible expert testimony to those witnesses who are "similarly situated" to the defendant health care provider whose actions are being challenged. In setting the criteria for determining whether the witness and the defendant are similarly situated, the two subsections speak as if both the witness and the defendant are individuals, that is, persons. Subsection (c) provides that, if the defendant health care provider is a specialist, then both the defendant and the witness must have similar certification and similar specialty training and recent practical experience; and subsection (b) provides that, if the defendant is not a specialist, then both the defendant and the witness must have similar non-specialty training and recent practical experience. This approach makes sense because only individuals can testify as witnesses and because non-individuals such as the Red Cross can act only through individuals in rendering medical services.

Therefore, in applying subsections (b) and (c) to those instances where the defendant is a non-individual, such as a professional corporation or a medical institution, which has acted through another individual health care provider, the focus should be on the individual practitioner whose specific action allegedly fell below the required standard of care. In other words, where the defendant is a non-individual who has acted through an individual health care provider, subsections (b) and (c) would seem to limit admissible expert testimony to those witnesses who are "similarly situated" to the specific individual practitioner whose action formed the basis for the litigation against the non-individual defendant. In-

deed, in *Leonard v. Providence Hospital*, 590 So.2d 906, 908 (Ala. 1991), the Alabama Supreme Court appears to have assumed this point in applying the same expert witness requirements for hospitals as for individual health care providers. *See also Wozny v. Godsil*, 474 So.2d 1078, 1079 & n.1, 1087 (Ala. 1985) (defendant hospital's liability arose solely because an individual health care provider's negligence was imputed to the hospital due to the individual's association with the hospital; the expert witness requirements applicable to the individual applied to the hospital).

However, in this case, as the court explains below, the Bartons have not shown that Dr. McGowan was responsible for the alleged negligence and the Red Cross claims that it has no record of who performed the allegedly negligent services. Thus, the court does not have before it an identifiable individual health care provider through which the Red Cross acted. This does not mean, however, that § 6-5-548 cannot be applied. Where the non-individual defendant has acted through an individual who is not specifically identified, then the focus, obviously, cannot be on the individual. Instead, the court must, to the extent possible, anthropomorphize the non-individual defendant in order to determine whether the witness is sufficiently similarly situated under subsections (b) and (c) to be competent to offer expert testimony. The court may do this by determining from the challenged conduct what type of individual health care provider would be rendering similar services.

It is apparent that the Red Cross's alleged negligence concerned the rendering of services in the area of blood banking, including blood collection, processing and distribution. Therefore, only a witness competent in this area by training and recent experience should be allowed to testify under § 6-5-548. Subsection (b) rather than Subsection (c) would apply because there is nothing in the record that shows that only a certified specialist could render such services.

The Bartons contend that Dr. Schwartz's position as a director of outpatient blood services, which involves transfusions to patients of his hospital, and his position on the Medical Advisory Committee for the Red Cross in his region qualify him as having experience and training in the same discipline as the Red Cross. In determining whether § 6-5-548's "similarly situated" criteria have been met, a court should not apply the section mechanistically but rather practically and with common sense.[6] A practical application of § 6-5-548 would dictate that, if, through training and recent experience, a witness has obtained expertise in a discipline but only in a narrow area of the discipline and not in the discipline in general, then the witness should not be competent to testify regarding matters outside that narrow area. Here, Dr. Schwartz has some experience and training in certain aspects of blood banking but not in the specific area of blood collection, processing and distribution involved in this litigation. The court therefore concludes that Dr. Schwartz does not qualify as a similarly situated health care provider.

The Bartons argue that, even if Dr. Schwartz does not qualify as an expert, expert testimony is not required to prove malpractice in this case because the malpractice was obvious to a layperson. Under Alabama law, the general rule in medical malpractice cases is that expert medical testimony is required to establish proper medical procedure. *Plitt*, 585 So.2d at 1325. An exception to this general rule has been made for cases in which an understanding of the doctor's lack of due care or skill requires only common knowledge or experience. *Id.* Whether the Red Cross's blood testing and donor screen-

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[6] *Cf. Wozny*, 474 So. 2d at 1087 (even if the defendant and the witness are of different schools of practice and thus are not "in the same general line of practice" as required by § 6-5-484 of the 1975 version of the AMLA, "the witness may nevertheless be competent to testify on those standards as to which the principles of the schools do or should concur").

ing procedures met the standard of care, however, is not an issue that falls within this exception.

In conclusion, because Dr. Schwartz's testimony is not competent and because the Bartons have failed to submit other admissible expert testimony, both the Red Cross and Dr. McGowan are entitled to summary judgment. Nevertheless, in order to provide a complete record and because, as is shown below, the Red Cross and Dr. McGowan would still be entitled to summary judgment even if Dr. Schwartz qualified as an expert, the court will evaluate the Bartons' claims on their merit as if Dr. Schwartz qualified as an expert. The court will refer to Dr. Schwartz as an "expert" for the sake of convenience.

D. The Red Cross

The Bartons claim that the Red Cross has violated the statutorily required standard of care in two ways: by failing to provide adequate donor screening questions and advice and by faling to retest blood. The Bartons also charge the Red Cross with fraudulently suppressing for six months the knowledge that the blood donor had tested HIV-positive on a subsequent donation. Finally, the Bartons charge the Red Cross with the tort of outrageous conduct for failing to disclose the donor's HIV-positive status.

i. Donor Screening Questions and Advice

The Bartons contend that the Red Cross violated the required medical standard of care by failing to advise prospective blood donors that, if they have been heterosexually promiscuous, they are at risk of having AIDS and should not give blood. Similarly, the Bartons argue that, as part of donor health history screening, the two defendants should have asked prospective donors if they have been heterosexually promiscuous. In addition, the Bartons argue that the Red Cross should have advised

donors that they are at risk if they have been the sexual partner of a person who is heterosexually promiscuous. The Bartons maintain that these questions are especially important for heterosexual female donors because females are several times more likely to contract the HIV virus from a male partner than a male would be to contract the virus from a female partner. The donor whose blood was given to Mrs. Barton is female.

Despite these contentions, the Bartons have not presented sufficient evidence that the failure to ask these questions violated the standard of care of blood collectors in 1988. The Bartons' expert, Dr. Schwartz, could only say that such questions are "desirable" and that "there might be a few people . . . who would exclude themselves under that line" of questioning. Dr. Schwartz also stated that it is "conceivable that asking that question may have affected the outcome in this particular case" but that he could not "go further than that." As to the standard of care, which determines the Red Cross's liability here, Dr. Schwartz conceded that "there's also a limit in terms of thinking up more and more questions to ask about dangerous behavior, and one would have to be guided by the blood banking community at the time, which listed these particular factors [in the Red Cross questionnaire]." Moreover, in response to a query whether the failure to ask the questions concerning heterosexual promiscuity violated the standard of care, Dr. Schwartz stated, "I can't give that opinion since no such standard existed at the time." He admitted that no one in the blood banking community asked donors about heterosexual promiscuity in 1988 and that the questions are still not asked today.

The Bartons point to the testimony of Dr. J. Jeffrey McCullough, the Red Cross official who was in charge of blood services in 1991. Dr. McCullough testified that the Red Cross should caution a female donor who "went home with a different man every night" that she may be

at risk of contracting HIV. He did not testify, however, that the Red Cross violated the appropriate standard of care by not including that warning or that other blood collectors included that warning. Similarly, Dr. McGowan testified that it would not be inappropriate to ask female donors about sexual activities with males but she did not say that failing to ask the question would violate the standard of care.

In contrast, Dr. Paul V. Holland, the Chairman of the Standards Committee of the American Association of Blood Banks, testified that heterosexual promiscuity has never been a high risk category for AIDS as defined by the Public Health Service and that, even today, blood collectors do not ask questions about heterosexual promiscuity. Dr. Holland also stated that no governmental body or professional organization has ever advocated excluding heterosexual promiscuous individuals from being donors.

ii. Failure to Retest Blood

The Bartons argue that the Red Cross violated the applicable standard of care in its testing of the donor's blood. In order to understand the Bartons' claims, it is necessary to explain the Red Cross's testing process. After the Red Cross receives blood donations, it takes a sample of each donor's blood and places it in a separate test tube for each donor. The Red Cross then tests the blood of numerous donors at the same time by putting a batch of test tubes in the same rack. A separate test kit is used for each batch of blood. Test tubes containing blood that is being tested for the first time are often tested in the same batch as test tubes containing blood that has already been tested once but is being retested.

The test used by the Red Cross is designed to be overly sensitive and to result in false positives. Therefore, the Red Cross routinely retests blood that has initially tested positive while it usually does not retest blood that has

initially tested negative. Blood that has initially tested positive is retested twice. If it retests negative on both retests, the blood is used for donations.

Mrs. Barton's donor's blood was tested in a batch of 143 test tubes.[7] Of these 143 tubes, 134 were being tested for the first time and nine were being retested. Mrs. Barton's donor's blood was being tested for the first time. Of the nine tubes being retested, seven had initially tested positive and two had initially tested negative. On the retest, all nine tested negative. Of the 134 tubes being tested for the first time, all tested negative except for one which tested positive. That positive was subsequently retested in another batch and tested positive again. Mrs. Barton's donor's blood, however, tested negative initially and was not retested.

The Bartons contend that the Red Cross violated the applicable standard of care by failing to retest Mrs. Barton's donor's blood after it initially tested negative. The Bartons base this claim on four theories. First, the Bartons maintain that, whenever one test tube tests positive in a batch of blood being tested, the entire batch should be retested. Second, the Bartons suggest that the Red Cross should have routinely retested all donated blood, even if the blood initially tested negative. Third, the Bartons claim that the particular test kit used to test the batch that included Mrs. Barton's donor's blood was faulty and unreliable. Finally, the Bartons claim that the Red Cross violated the standard of care by using blood that initially tested positive if it subsequently retested negative.

Initial Positive Test. As to the first claim, the Bartons' expert, Dr. Schwartz, opined that, when a donor's blood initially tests positive but then retests negative, the entire batch of blood that was initially tested with the donor's blood should be retested. Dr. Schwartz's theory is that

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[7] In fact, 149 tubes were tested in the batch but five were controls and one was non-donor blood.

this "false positive" raises the possibility that the blood being retested was mislabelled or switched. Thus, according to the Bartons, unless the entire batch is retested, the HIV-positive blood will have passed through the testing process.

This theory is not applicable to the facts of this case. The testimony is undisputed that, in the batch in which Mrs. Barton's donor's blood was tested, only one test tube of blood tested positive. This positive result, from another donor, came out positive again on retesting. Thus, there was no possibility of a mix-up or mislabelling of blood. The Red Cross accounted for the only test tube of blood that tested positive.

Routine Retesting. The Bartons contend that all blood should be retested, even if the initial result is negative, because the cost of a test is only one dollar and the initial test can be unreliable. The Bartons have not presented any evidence to show that the standard of care requires routine retesting. The Bartons' own expert testified that he was not aware of any studies which showed that retesting initial negative results "would have added anything." He also stated that "the single test was considered sufficient in the instance of negativity" and that the Food and Drug Administration did not require retesting of initial negative results. As to the general reliability of the test used by the Red Cross, Dr. Schwartz stated that he did not know of any problems.

The Bartons claim that the test is generally unreliable because it produces many positive results that turn out negative on retesting. Therefore, they argue that it is also possible that initial negative results could turn out positive on retesting. The Bartons' logic is flawed, however, because the undisputed testimony is that the initial test is designed to be overly sensitive and thus to pick up initial "false positive" results. As Dr. Holland testified, "HIV positive initial tests are not errors or flaws in reliability of the testing, but intended by-products of a

cautiously designed test." Accordingly, as the Red Cross's other witnesses testified, retesting initial negative results was not the standard practice for any blood collectors and would not detect more infectious donors.

Faulty Test Kit. Dr. Schwartz questioned the reliability of the particular test kit that was used to test Mrs. Barton's donor's blood. His concern was due to the retesting, in the same batch as Mrs. Barton's donor's blood, of seven test tubes that had initially tested positive. The retests of all seven came out negative. The retesting of seven test tubes, all of which retested negative after initially testing positive, led Dr. Schwartz to believe that there may have been a problem with the particular test kit or the way in which the test was performed. Nevertheless, Dr. Schwartz would not testify that he believed to a reasonable degree of medical certainty that there was a problem with the test. He stated he needed more information to make that determination but the Bartons have not offered any further testimony from Dr. Schwartz. Moreover, Dr. Schwartz testified that the manner in which the tests were performed was not improper and did not violate the standard of care. Thus, although Dr. Schwartz suggested the possibility of a problem with the test, he refused to state that the test violated the standard of care.

The Bartons attempt to buttress the claim that Mrs. Barton's donor's test was faulty by pointing to a separate batch of blood tested three days later that was completely unrelated to the batch containing Mrs. Barton's donor's blood. In this unrelated batch, 26 tubes that had initially tested positive at some point were retested. Unsurprisingly, 25 of these 26 tubes tested negative on the retest. As explained above, the Red Cross's experts testified that the initial test is intended to be overly sensitive and that over 90% of initial positive results test negative on retesting. Although Dr. Schwartz raised concern about the retests, he admitted that he did not know what percentage of initial positives will ordinarily test negative on restesting.

Use of Initially Positive Blood. The Bartons add that the Red Cross should not use blood that initially tests positive even if the blood tests negative on two subsequent retests. Even if using this blood violates the standard of care, however, the Bartons have not shown how such a violation is relevant to this case. The undisputed testimony is that Mrs. Barton's donor's blood initially tested negative. Thus, the use of initially positive blood is not connected in any way to Mrs. Barton's transfusion.

Finally, in a general and unfocused effort to show that the Red Cross was negligent, the Bartons have also submitted Food and Drug Administration (FDA) reports of investigations of the Red Cross's blood collection sites in Huntsville, Alabama during May 1988 and May 1990 and Dothan, Alabama during May 1990. These two sites only collect and do not test blood. Mrs. Barton's donor's blood was collected at a site in Montgomery, Alabama and tested at the Red Cross Blood Collection Center in Birmingham, Alabama. Thus, the Huntsville and Dothan reports have little relevance to the procedures followed at the Birmingham testing site.

The Bartons, however, have also submitted FDA reports of investigations of the Birmingham testing site conducted in February-March 1990 and November 1990. The language of the reports is technical and the Bartons have simply presented the reports without submitting other testimony to explain their significance.[8] The reports cite numerous problems at the testing site including problems with the computer data management system, shipment of blood for emergency release prior to completion of testing without proper documentation, faulty equipment such as thermometers and scales, and that the personnel responsible for the collection and testing of blood lacked sufficient

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[8] The Bartons note that the Red Cross delayed delivering the reports to them. However, the Bartons never requested that they be allowed to submit affidavits explaining the reports.

training. In addition, the Bartons claim that the Birmingham testing site was understaffed and that Dr. McGowan, the medical director of that blood bank, was dismissed because she conducted more testing than the national headquarters allowed.

Although the FDA reports and Dr. McGowan's dismissal suggest problems in general with the Birmingham testing site, the Bartons have not pointed to any specific evidence showing that Mrs. Barton's donor's blood was negligently tested. In fact, the Bartons admit that "there is no specific incidence of noncompliance that directly affected the test done on the blood of the donor that was transfused into Rebecca Barton." In addition, the blood that was transfused into Mrs. Barton was collected and tested in June 1988. The FDA investigations were conducted in March and November 1990, over a year and a half after Mrs. Barton's donor's blood was tested. The Red Cross's experts have testified that the Red Cross's testing procedures complied with the standard of care among blood collectors in 1988. The Bartons have failed to present sufficient evidence to raise a genuine issue of fact as to whether the Red Cross violated the applicable standard of care in testing Mrs. Barton's donor's blood.

In addition to the Bartons' failure to present sufficient evidence that the Red Cross violated the standard of care, the Red Cross has presented evidence suggesting a plausible explanation for failing to discover that the donor was HIV-positive in June 1988. As noted above, if a donor contracts HIV within a six-month "window period" of a blood test, the donor's HIV-positive status may simply not show up on an HIV test. Thus, it is possible that the Red Cross properly tested Mrs. Barton's donor's blood but that no test would have picked up that the donor was HIV positive. Accordingly, summary judgment on all of the Bartons' negligence claims should be granted.[9]

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[9] The Bartons additionally claim that the Red Cross was negligent or wanton in conducting the look-back and transfusion re-

iii. Fraudulent Suppression

The Bartons claim that for six months, from June 1990 to December 1990, the Red Cross fraudulently suppressed its knowledge that Mrs. Barton's blood had tested HIV-positive. The Bartons argue that, once the Red Cross discovered that the donor's blood tested positive on June 9, 1990, the Red Cross had a duty to immediately conduct a confirmatory test. The Bartons further contend that, once the donor's blood was confirmed to be HIV-positive, the Red Cross had a duty to immediately conduct a "look-back" to determine if the donor had previously given blood, and if so, to determine the recipient hospital and inform the hospital of the donor's HIV-positive status. Thus, according to the Bartons, the Red Cross's duty was not merely to disclose information already in its possession but first to conduct an inquiry to determine which hospital, if any, had previously received blood from the donor. Furthermore, because the Red Cross ultimately informed the hospital of the donor's HIV status, the issue is not whether the Red Cross had a duty to conduct an inquiry and to disclose but whether it had a duty to do this within a reasonable period of time.[10]

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cipient notification procedures. The court notes that it need not address this claim as the Bartons have never amended their complaint to include the claim. After the Bartons were informed of the Red Cross's delay in notifying Mrs. Barton, the Bartons amended their complaint to include only claims for fraudulent concealment or suppression and the tort of outrage. Nevertheless, the Bartons' claim that the Red Cross was negligent or wanton in conducting the look-back and notification procedures also lacks merit for the reasons the court gives in its discussion of their fraudulent suppression claim.

[10] In addition, although the Bartons claim that the Red Cross delayed notification for six months, the Bartons's expert on their negligence claims, Dr. Schwartz, stated that the look-back procedure should have begun only after receiving the results of a

Determining what period of time is reasonable requires reference to a standard of care. The AMLA provides that the "standard of care is that level of such reasonable care, skill and diligence as other similarly situated health care providers in the same general line of practice, ordinarily have and exercise in like cases," § 6-5-542(2), and that "This definition applies to all actions for injuries or damages or wrongful death whether in contract or tort and whether based on intentional or unintentional conduct." *Id.* The Alabama Supreme Court has stated that "it is the substance of the action, not the form of the action, that determines whether it is a medical malpractice action and whether it is, therefore, controlled by the provisions of the Alabama Medical Liability Act." *Allred v. Shirley*, 598 So.2d 1347, 1348 (Ala. 1992) (per curiam); *see also Benefield v. F. Hood Craddock Clinic*, 456 So.2d 52, 54 (Ala. 1984). In *Benefield*, the court found that the plaintiff's fraudulent misrepresentation claim was in substance a medical malpractice claim and that the action was controlled by the AMLA. *Id.* However, fraudulent concealment may still be the basis for a medical malpractice cause of action. *Johnson v. McMurray*, 461 So.2d 775, 778 (Ala. 1984); *Trammer v. Bernstein*, 596 So.2d 572, 574 (Ala. 1991).

The substance of the Bartons' look-back and notification claim is that the Red Cross did not disclose the blood donor's HIV status within six months and that six months was an unreasonable period of time. In order to determine whether six months was unreasonable, the court

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confirmatory test of the donor's blood. Dr. Schwartz also stated the average time to conduct a confirmatory test is three weeks. The Red Cross did not receive the confirmatory test results until approximately two months after the donor's blood initially tested positive. Thus, using Dr. Schwartz's statements, the delay here was four or five months, rather than six. Nevertheless, for the purposes of summary judgment, the court will assume a six-month delay.

must start from a standard of care with which to compare the Red Cross's procedures. Despite the Bartons' labelling of their claim as fraudulent suppression, it is in substance a claim for negligence in conducting the look-back and notification process; it is in substance a challenge to medical procedures. Therefore, the provisions of the AMLA control the Bartons' fraudulent suppression claim.

Under the AMLA, the Bartons must show that a six-month delay in conducting a look-back and notification was not in accordance with the standard of care pertaining to look-back procedures in 1990. The Bartons have failed, however, to present any evidence of the amount of time similarly situated blood collectors took to conduct look-backs and notifications in 1990. Plaintiffs point to the testimony of their expert, Dr. Schwartz, who testified that the look-back and notification "process seemed to be delayed an inordinate length of time." Dr. Schwartz also stated: "The long turn-around time for the Western Blot [the confirmatory test], almost two months, seems out of keeping with usual experience; and the delay to start the look-back between August 7th and September 7th, when I understand this stuff was computerized and probably could have been quickly available, this look-back could be done fairly quickly, but it took them a month to get to that."

Although Dr. Schwartz suggests that the Red Cross should have performed the look-back and notification process more quickly, he does not state that other blood collectors performed the process in less than six months or that six months was an unreasonable amount of time based on the standard of other blood collectors. In fact, Dr. Schwartz admitted that the Red Cross's look-back and notification procedure in 1990 "sounds reasonably close to what everybody else [other blood collectors] was doing." He also admitted that he did not know what the average time period for a look-back and notification was or whether any other blood collectors had time restrictions

on how fast the look-back should take, and that, in fact, he has never been involved in a look-back procedure. The 1990 FDA investigation report of the Birmingham testing site, where the look-back was conducted, made no mention of the look-back procedures.[11] Thus, the Bartons have failed to raise a genuine issue of material fact as to their look-back and notification claim under the AMLA.

Even if the AMLA does not control the Bartons' fraudulent suppression claim, the Bartons have still failed to present evidence to avoid summary judgment. In order to make out a claim for fraudulent suppression under Alabama law, a plaintiff must show: "(1) a duty to disclose facts; (2) concealment or nondisclosure of material facts by the defendant; (3) inducement of the plaintiff to act, and (4) action by the plaintiff to his injury." *Norman v. Amoco Oil Co.*, 558 So.2d 903, 905 (Ala. 1990) (citations omitted). The Alabama Supreme Court has stated that, "In determining the existence of a duty, the trial court makes a legal decision." *Berkel & Co. Contractors, Inc. v. Providence Hosp.*, 454 So.2d 496, 506 (Ala. 1984); *see also Dominick v. Dixie Nat'l Life Ins. Co.*, 809 F.2d 1559, 1569 (11th Cir. 1987).

As noted above, the Bartons contend that the Red Cross had a duty to conduct the look-back process and to disclose the blood donor's HIV status within a reasonable period of time. The Red Cross asserts that it had no duty to warn Mrs. Barton of potential danger because no confidential relationship existed between the Red Cross

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[11] One report did note that

> "Confirmatory Test positive deferred donors may not be notified for up to four months after confirmation. Unaware donors continue to donate during the notification delay and an unsuitable unit can conceivably be distributed."

Although this statement suggests that a four-month period to notify the donor (as opposed to the recipient of the donor's blood) may be long, it does not suggest that a six-month period to notify the recipient is unreasonable.

and Mrs. Barton. The court cannot agree. Alabama's fraudulent suppression statute allows recovery even in the absence of a confidential relationship between the parties. "The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." Ala. Code 1975 § 6-5-102. *See Jim Short Ford Sales, Inc. v. Washington*, 384 So.2d 83, 86-87 (Ala. 1980).

In the alternative, the Red Cross asserts that an obligation to communicate arises "from the particular circumstances of the case" only when the parties have a direct relationship with direct communications. Again, this assertion is contrary to Alabama law. The Alabama Supreme Court has frequently stated that a duty to disclose "depends upon the relation of the parties, the value of the particular fact, the relative knowledge of the parties, and other circumstances." *See, e.g., RNH, Inc. v. Beatty*, 571 So.2d 1039, 1042 (Ala. 1990); *Jim Short Ford*, 384 So.2d at 86. Although a direct relationship between the parties will usually be present, no direct relationship is required. Instead, "each case must be individually examined to determine whether a duty of disclosure exists; a rigid approach is impossible, and, indeed, the words of the statute itself counsel flexibility." *Jim Short Ford*, 384 So.2d at 87.

Although the Red Cross and Mrs. Barton had no direct relationship, they did have a relationship in that the Red Cross was responsible for supplying the blood that was used in Mrs. Barton's transfusion. Thus, once the Red Cross discovered that the donor was HIV-positive, it had more responsibility to disclose that fact to prior blood recipients than would a third-party, such as a neighbor, who happened to learn that the donor was HIV-positive.

The particular undisclosed fact here, the donor's HIV-positive status, was of tremendous value to Mrs. Barton. Not only did the knowledge affect Mrs. Barton's own

health but it also affected her behavior toward her family, especially her husband, and her students. Without the knowledge that she was possibly HIV-positive, she unwittingly put her family and students at risk of becoming infected as well. Thus, the particular fact here did not merely concern the monetary value of merchandise but the lives of numerous individuals.

The Red Cross suggests that the statistical value of the information was low because few transfusion recipients become infected from transfusions. Dr. Alfred Saah, an Associate Professor of Epidemiology, testified that the current risk of obtaining HIV from a transfusion is approximately one in 225,000 and that less than 20 transfusion recipients have been reported HIV-positive since blood collectors have implemented HIV antibody testing. These data, however, are for all transfusions, regardless of the status of the donor. The data do not state the risk of obtaining HIV from a transfusion from a donor who has subsequently tested HIV-positive.

The relative knowledge of the parties also points heavily toward finding a duty to disclose. Mrs. Barton had no way of knowing that the donor had tested positive. The only other point at which Mrs. Barton would have discovered the need for an HIV test would have been once she showed the symptoms of having HIV, a point which could be too late to extend her life or to prevent transmission to others. Thus, all of the facts were within the Red Cross's knowledge.

As to this point, the Supreme Court of Alabama, quoting from Prosser, *Torts* Chap. 18, § 106 (4th ed. 1971), has noted that most courts have found

> "a duty of disclosure in cases where defendant has special knowledge or means of knowledge not open to the plaintiff and is aware that the plaintiff is acting under a misapprehension as to facts which would be of importance to him and would probably affect his decision. [Prosser, supra, p. 697]"

Jim Short Ford, 384 So.2d at 86. Here, the Red Cross had special knowledge not open to Mrs. Barton. In addition, the Red Cross was aware that prior transfusion recipients were acting under a misapprehension that they were not at risk of having obtained HIV from their transfusions. The court therefore concludes that, once the Red Cross learned that a previous donor was HIV-positive, the Red Cross had a duty to conduct a look-back process and to disclose the blood donor's HIV status within a reasonable period of time.

Although the court finds that the Red Cross had a duty to disclose the donor's HIV status within a reasonable time as a matter of law, the Bartons have failed to present any evidence of what period of time was reasonable. Even if the AMLA does not control the fraudulent suppression claim, the Bartons must still present some evidence that a six-month delay was unreasonable. The testimony of Dr. Schwartz does not suffice. He merely suggested that the Red Cross could have performed the look-back procedure more quickly without identifying what period of time would be reasonable.[12] Therefore, the court will grant summary judgment as to the Bartons' fraudulent suppression claim.[13]

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[12] The Bartons also argue that, once the Red Cross voluntarily assumed the duty of informing the Medical Center that the donor was HIV-positive, the Red Cross was under an obligation to act with due care by informing the hospital immediately. The Bartons attempt to analogize this case to a situation in which a person who has no duty to rescue another voluntarily undertakes the rescue and then acts without due care. In that situation, the rescuer has increased the danger ot the person being rescued by the voluntary undertaking and therefore must act with due care. The Red Cross, however, did not increase the danger to Mrs. Barton by voluntarily informing the Medical Center. Thus, the Red Cross took on no duty to act immediately.

[13] Although the court rejects the Bartons' fraudulent suppression claim based on the duty to disclose, the court will nevertheless address the other three parts of the test. The Red Cross contends that, in order to state a claim for fraudulent concealment, the

iv. Tort of Outrage

The Bartons contend that the Red Cross's delay in notifying them of the blood donor's HIV-posiitve status

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Bartons must show that the Red Cross concealed a material fact with intent to deceive the Bartons. The Alabama Supreme Court, however, has held that, under Ala. Code 1975 § 6-5-102, a showing of the defendant's intent to deceive is not required if the plaintiff shows a confidential relationship between the parties or a duty to disclose from the particular circumstances of the case. *See Chapman v. Rivers Constr. Co.*, 227 So.2d 403, 410 (Ala. 1969); *Stone v. Gulf American Fire & Cas. Co.*, 554 So.2d 346, 360 (Ala. 1989), *cert. denied*, 496 U.S. 943, 110 S.Ct. 3229 (1990). Intent to deceive is only required in the absence of a confidential relationship or particular circumstances imposing a duty to disclose. *Chapman*, 227 So.2d at 410. As the Eleventh Circuit has explained:

> "Section 6-5-102 does not require proof of intent to deceive. The breach of an obligation to disclose is sufficient to trigger liability for fraudulent suppression."

Intercorp, Inc. v. Pennzoil Co., 877 F.2d 1524, 1535 (11th Cir. 1989) (citing *Chapman*, 227 So.2d at 410). Therefore, had the Red Cross failed to disclose the donor's HIV-positive status within a reasonable time, even without an intent to deceive, the concealment requirement would have been satisfied.

The Red Cross asserts that the Bartons have failed to demonstrate any damages from the alleged concealment. The Red Cross correctly points out that the notification delay did not cause Mrs. Barton's husband, children, students or others to become infected. The Red Cross also notes that the Bartons have not presented any evidence that the notification delay altered Mrs. Barton's treatment, condition, or prognosis. Mrs. Barton's treating physician, Dr. Coe, testified that he would not have started AZT treatment any earlier. The Red Cross also contends that, although the Bartons suffered emotional distress upon initially learning of Mrs. Barton's HIV status, the notification delay did not cause any additional compensable emotional distress. By the time the Bartons learned of the notification delay, in February or March 1992, the Bartons already knew that Mrs. Barton had not infected anyone else.

Nevertheless, the court finds that the Bartons have presented sufficient evidence of emotional distress caused by the notification delay. Mrs. Barton testified that upon being told of the delay she was "very upset" and "hurt" that she was "allowed to continue to expose others when there was no need in it." Mrs. Barton also

constitutes the tort of outrage. To recover under the tort of outrage, the plaintiff "must demonstrate that the defendant's conduct (1) was intentional or reckless; (2) was extreme and outrageous; and (3) caused emotional distress so severe that no reasonable person could be expected to endure it." *Green Tree Acceptance, Inc. v. Standridge*, 565 So.2d 38, 44 (Ala. 1990). The elements of the tort are met only in rare circumstances: "the conduct complained of must be so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized society." *Id.*

The court finds that the circumstances here are not so extreme as to constitute the tort of outrage under Alabama law. As the Bartons concede, the Red Cross did not intentionally delay notifying Mrs. Barton. Although recklessness suffices to make out the tort, the conduct must be even more extreme in the absence of intent. The Red Cross's conduct, however, did not "go beyond all possible bounds of decency." Once the Red Cross received the test results confirming that the blood donor was HIV-positive, the Red Cross delayed approximately four months before informing the hospital. Certainly,

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stated that learning of the delay depressed and scared her due to the possibility that she had exposed others during the period of the delay in notification. The court believes that the alleged anxiety that Mrs. Barton suffered as a result of her fear that, during the delay, she may infected her family and friends, is recoverable in damages. This evidence also suffices to raise a genuine issue of material fact as to the Bartons' reliance to their detriment on the Red Cross's notification delay.

The Red Cross notes that the Bartons did not receive any medical treatment for distress related to the notification delay. While this fact is relevant to damages, it is not dispositive. Claims for damages for mental anguish need not be predicated upon the presence of physicial symptoms. *See Alabama Power Co. v. Harmon*, 483 So.2d 386, 389 (Ala. 1986). The Bartons only need to show some evidence of mental anguish. *Id.* The court finds that the Bartons have raised a genuine issue of material fact as to damages.

some of that time was spent conducting the look-back procedure itself. The Red Cross also first located and notified the donor that she was HIV-positive.

Moreover, the Red Cross had no time limits in its policy guidelines for conducting look-backs and notifications, and the Bartons have not shown that any other blood-banking organization had time restrictions. This lack of guidelines strongly suggests that the Red Cross's delay of six months or less did not constitute outrageous conduct. While other cases involving a longer delay may constitute outrageous conduct, the facts here do not support finding of outrageous conduct as a matter of law.

E. Dr. McGowan

As explained above, the court finds that the Bartons have failed to present sufficient evidence to raise a genuine issue of material fact on any of their claims against the Red Cross. These same findings are applicable to Dr. McGowan. In addition, Dr. McGowan is entitled to summary judgment because the Bartons have not shown that she was even responsible for any of the policies and actions challenged in this litigation. As to donor screening and advice, Dr. McGowan contends that all donor screening and advice policies were set by the Red Cross National Headquarters and that she was not personally involved in establishing the policies. Indeed, the Bartons have not challenged any conduct of Dr. McGowan in failing to supervise properly donor screening and advice or in conducting the procedure herself. The Bartons have not presented any evidence that Dr. McGowan committed any negligent acts concerning donor screening.

Nor have the Bartons presented any evidence of negligent acts by Dr. McGowan that pertain to the testing of Mrs. Barton's donor's blood. At most, as noted above, the Bartons have presented FDA investigation reports that there were problems in general at the testing site and

that Dr. McGowan was ultimately dismissed. However, the Bartons have not shown how this evidence affected the testing of Mrs. Barton's donor's blood. Finally, the Bartons have not presented any evidence that Dr. McGowan was involved in the look-back and notification procedure concerning Mrs. Barton's donor or that her supervision of the look-back and notification was negligent, other than evidence of problems in general at the testing site.

II. MOTION TO DISMISS

Dr. McGowan, who is being sued in her individual capacity, has filed a separate motion to dismiss contending that she is entitled to absolute immunity from suit as a policy-making employee of a federal instrumentality. She also contends in the alternative that the Bartons' jury demand and claims for punitive damages should be struck. Although Dr. McGowan is entitled to summary judgment as to all claims against her, the court will still address her separate contentions in order to provide a complete record.

Federal employees suable in their individual capacities under state tort law are entitled to absolute immunity if the challenged conduct is "within the scope of their official duties *and* the conduct is discretionary in nature." *Westfall v. Erwin*, 484 U.S. 292, 297-98, 108 S.Ct. 580, 584 (1988) (emphasis in original).[14] The Eleventh Circuit

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[14] In response to *Westfall*, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act (FELRTCA), 28 U.S.C.A. § 2679(b)(1), which creates absolute tort immunity for those federal employees working for federal entities covered by the Federal Tort Claims Act (FTCA), 28 U.S.C.A. §§ 1346(b), 2671-2680. This absolute immunity extends to all acts of these employees within the scope of their employment regardless as to whether the acts are discretionary. *See United States v. Smith*, —— U.S. ——, ——, ——, 111 S.Ct. 1180, 1183-84 (1991). Neither the Bartons nor the defendants contend that the FELRTCA applies to the Red Cross.

has extended this immunity to employees of federal instrumentalities. *See Franks v. Bolden*, 774 F.2d 1552, 1554-55 (11th Cir. 1985) (official immunity available to employees of Tennessee Valley Authority (TVA)); *see also Milligan v. American Hoist & Derrick Co.*, 622 F. Supp. 56, 58 (W.D. Tenn. 1985) ("TVA personnel, as employees of a federal instrumentality, may invoke the full range of immunity"). And, as explained in earlier orders by this court, the Red Cross, like the TVA, is a federal instrumentality. In *Barton v. American Red Cross (Barton II)*, —— F. Supp. ——, (M.D. Ala. Feb. 25, 1993), this court held that the Red Cross, as a federal instrumentality, is not subject to punitive damages, and in *Barton v. American Red Cross (Barton III)*, —— F. Supp. ——, (M.D. Ala. July 7, 1993), the court held that the Red Cross, as a federal instrumentality, is subject to "nonjury" trial only. The Bartons argue, however, that the fact that an entity may be a federal instrumentality for one purpose does not mean that it is a federal instrumentality for another purpose. *See Barton III*, —— F. Supp. at —— (discussing this distinction). Assuming this to be true, the court is still convinced that the Red Cross is a federal instrumentality to the extent that its employees enjoy absolute immunity under *Westfall*.

In *Westfall*, the Supreme Court explained that the reason behind official immunity is "that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective government will be promoted if officials are freed of the costs of vexatious and often frivolous damage suits." 484 U.S. at 295, 108 S.Ct. at 583. The threat posed by litigation to the ability of officials to carry out their duties, unintimidated, in the national interest is the same for both the Red Cross and the federal government. In *Department of Employment v. United States*, 385 U.S. 355, 360, 87 S.Ct. 464, 467 (1966), the Supreme Court wrote that the Red Cross enjoys the "status" of being "Congress

chartered the present Red Cross in 1905, subjecting it to governmental supervision and to a regular financial audit by the Defense . . . Department." *Id.* (citation omitted). *See* 36 U.S.C.A. §§ 1, et seq. The Court continued that "Its principal officer is appointed by the President, who also appoints seven (all government officers) of the remaining 49 Governors," *id.* (citation omitted); that "By statute and Executive Order there devolved upon the Red Cross the right and the obligation to meet this Nation's commitments under various Geneva Conventions, to perform a wide variety of functions indispensable to the workings of our Armed Forces around the globe, and to assist the Federal Government in providing disaster assistance to the States in time of need," *id.* (footnotes omitted); and that, "Altough its operations are financed primarily from voluntary private contributions, the Red Cross does receive substantial material assistance from the Federal Government." *Id.* (footnote omitted). Therefore, as this court explained in *Barton III*, "the Red Cross is so intertwined with and essential to the operation of the federal government, both internationally and domestically, that litigation poses the same potential for interference with public administration to the Red Cross as it does to the federal government in general." —— F. Supp. at ——. The Red Cross should be placed on a par with the federal government when it comes to the question of the extent to which the Red Cross should be open, or not open, to litigation. Thus, the court must begin with the premise that the employees of the Red Cross are entitled to official immunity from litigation if the challenged conduct is within the scope of their official duties and the conduct is discretionary in nature.

It is clear that Dr. McGowan's challenged conduct was within the scope of her official duties. Therefore, the only question is whether the conduct was discretionary in nature. The Supreme Court has not defined the precise meaning of discretionary conduct within the context of

official immunity. However, in *United States v. Gaubert*, —— U.S. ——, ——, 111 S.Ct. 1267 (1991), a recent case interpreting the discretionary function exception to liability under the Federal Tort Claims Act (FTCA), 28 U.S.C.A. §§ 1346(b), 2671-2680, the Court outlined some principles which would be equally applicable to claims of official immunity. The FTCA's discretionary function exception, § 2680(a), is similar to official immunity for discretionary conduct. The section provides in part that the government is not liable for acts of employees "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty."

In interpreting this FTCA exception, the Court in *Gaubert* applied a two-part test. First, the trier of fact must determine whether the challenged act or omission was the product of judgment or choice or, instead, violated a mandatory regulation or policy. *Id.* at ——, 111 S.Ct. at 1273.[15] Second, " 'even assuming the challenged conduct involves an element of judgment,' " the factfinder must then determine whether the challenged act or omission is the kind of conduct " 'that the discretionary function exception was designed to shield,' " *id.* (quoting *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S.Ct. 1954, 1958 (1988)), that is, conduct "grounded in the policy of the regulatory regime." *Gaubert*, —— U.S. at ——, 111 S.Ct. at 1275.[16]

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[15] In *Gaubert*, the Court explained that:

> "The requirement of judgment or choice is not satisfied if a 'federal statute, regulation or policy specifically prescribes a course of action for an employee to follow,' because 'the employee had no rightful option but to adhere to the directive.' "

Id. at ——, 111 S.Ct. at 1273 (quoting *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S.Ct. 1954, 1958 (1988)).

[16] In *Gaubert*, the Court discussed the type of conduct that would meet the first but not the second test:

> "[If a governmental official] drove an automobile on a mission connected with his official duties and negligently collided with

The Eleventh Circuit Court of Appeals previously stated that official immunity extends only to acts "involving planning or policy considerations" and not to those which "concern day-to-day operations." *Bolden*, 774 F.2d at 1555 (citations omitted). *See also Andrews v. Benson*, 809 F.2d 1537, 1543 (11th Cir. 1987) (the acts of a supervisor in insuring the day-to-day enforcement of an agency's standards and regulations are not discretionary). However, in *Autery v. United States*, 992 F.2d 1523 (1993), the Eleventh Circuit rejected a similar distinction in the context of the FTCA:

> "The Supreme Court squarely rejected this proposed distinction in Gaubert, ruling that the Fifth Circuit 'erred in holding that the [discretionary function] exception does not reach decisions made at the operational or management level.' *Gaubert*, —— U.S. at ——, 111 S.Ct. at 1275. 'Discretionary conduct is not confined to the policy or planning level.' *Id.; see also* [*United States v. S.A. Empresa de Viacao Aerea Rio Grandense*] *Varig Airlines*, 467 U.S. [797,] 813, 104 S.Ct. [2755,] 2764 [(1984)] ('[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case')."

992 F.2d at 1527 (footnotes omitted). In light of *Gaubert* and *Autery*, this court concludes that official immunity includes not only acts involving planning or policy considerations but also those which concern day-to-day operations.

Furthermore, in determining whether an employee enjoys official immunity, a court should be cautious not to

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another car, the exception would not apply. Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.

Id. at —— n. 7, 111 S.Ct. at 1275 n. 7.

forge into a fact-based inquiry into the circumstances surrounding the government actor's exercise of a particular discretionary function, but should instead look to the nature of the challenged decision in an objective, or general sense and ask whether that decision is one which a reasonable person would expect inherently to be grounded in considerations of policy. *cf. Autery*, 992 F.2d at 1530 (requiring a similar approach for determinations under the FTCA's discretionary function exception).

As outlined above, the Bartons challenge a number of different actions allegedly taken by Dr. McGowan and policies set by the Red Cross. Although Dr. McGowan denies that she was personally involved in setting any of the policies that the Bartons challenge, the court will take the allegations of the Bartons' complaint as true and will assume, for purposes of Dr. McGowan's motion to dismiss, that she was involved in the challenged actions for the purpose of discusing her immunity defense. The Bartons' claims fall into three areas.

First, the Bartons claim that Dr. McGowan failed to advise prospective blood donors that they are at risk of having AIDS and should not give blood if they have been heterosexually promiscuous or if they have been the sexual partner of a person who has been heterosexually promiscuous. The Bartons also maintain that the donor health screening questionnaire should have asked prospective donors if they have been heterosexually promiscuous. The Bartons do not contend that Dr. McGowan failed to ask a specific question or offer any specific advice that Red Cross policy required. Rather, they challenge the choice of questions to ask prospective donors. Thus, on their face, these challenges involve judgment or choice. Furthermore, because the challenges involve the setting of blood screening policy, they are "grounded in the policy of the regulatory regime" of the Red Cross.

Second, the Bartons claim that Dr. McGowan failed to retest Mrs. Barton's donor's blood after it initially tested

negative. They base their claim on four theories. As explained in greater detail above, the first three of these theories are: whenever one test tube in a batch of blood tests positive, the entire batch should be retested; all blood should be routinely retested; and blood that initially tests positive should never be used. These three theories involve judgment and the setting of policy concerning blood testing and which blood may be used. Thus, assuming Dr. McGowan set these policies, she would be entitled to immunity. The Bartons' fourth theory is that the particular test kit that was used to test Mrs. Barton's donor's blood was faulty or that the manner in which the test was performed was improper. This claim does not go to the setting of blood testing policy but to the performance of the test itself. Although the performance of the test may involve some judgment, that judgment is not grounded in setting the Red Cross's regulatory policy. As witnesses for defendants explained, the Red Cross used a specific type of HIV test on donors' blood. The persons who tested the blood were not free to choose a different test. The test kit had specific instructions for performing the test which were to be followed. Therefore, to the extent that Dr. McGowan was personally involved in the testing itself, she would not be entitled to immunity.

Third, the Bartons claim that Dr. McGowan was responsible for overseeing the look-back and notification procedure after Mrs. Barton's donor's blood tested positive in 1990 and suggest that her supervision of the process resulted in an unreasonable delay in informing Mrs. Barton of the donor's HIV-positive status. The Red Cross had no policy concerning the amount of time in which a look-back and notification was to be conducted. Nevertheless, the decision as to how long the procedure should take involved judgment and the setting of regulatory policy. Therefore, to the extent Dr. McGowan was responsible for supervising the look-back and notification

procedure, she had to set policy in determining how long the procedure would take and is entitled to immunity.[17]

III. CONCLUSION

With this memorandum opinion, the court should not be understood as having concluded that the Barton family has not suffered a great tragedy; it has. Everyone connected with litigation cannot help but feel deeply for Mrs. Barton and her family. Nevertheless, if this court is to remain faithful to the rule of law it must conclude that the facts presented do not warrant relief under the law relied upon by the Bartons. An appropriate judgment will be entered on the motion to dismiss and the motions for summary judgment filed by the Red Cross and Dr. McGowan.[18]

DONE, this the 9th day of July, 1993.

/s/ [Illegible]
United States District Judge

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[17] To the extent that Dr. McGowan is not entitled to absolute immunity and thus is open to liability in her individual capacity, she is similarly not entitled as an individualy to governmental immunity from punitive damages or from trial by jury.

[18] Mrs. Barton's husband and two sons have asserted derivative claims for loss of Mrs. Barton's services. Because full summary judgment and partial dismissal are warranted as to Mrs. Barton's main claims, the same disposition is warranted as to her husband's and her sons' derivative claims.

[Filed Jul. 9, 1993]

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 91-T-1001-S

R. A. BARTON, *et al.*,
Plaintiffs,

v.

AMERICAN RED CROSS, *et al.*,
Defendants.

JUDGMENT

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court:

(1) That the motion to dismiss filed by defendant Eoline McGowan, M.D., on March 9, 1993, is granted as to all of the plaintiffs' claims except their "faulty test kit" claim;

(2) That the motions for summary judgment filed by defendants American Red Cross and Eoline McGowan, M.D., on January 25, 1993, are granted in full; and

(3) That final judgment is entered in favor of the defendants and against the plaintiffs, with plaintiffs taking nothing by their complaint.

It is further ORDERED that costs are taxed against the plaintiffs, for which execution may issue.

DONE, this the 9th day of July, 1993.

/s/ [Illigible]
United States District Judge

[Filed Jul. 9, 1993]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA SOUTHERN DIVISION

Civil Action No. 91-T-1001-S

R. A. BARTON, *et al.*,
Plaintiffs,

v.

AMERICAN RED CROSS, *et al.*,
Defendants.

ORDER

By orders entered on February 25 and July 7, 1993, the court held that the defendant American Red Cross was not subject to punitive damages or to a "jury" trial. In addition, by order entered this day, July 9, 1993, the court has entered final judgment in favor of defendants, the Red Cross and Dr. Eoline McGowan, and against the Barton plaintiffs. It would appear at first blush that the Bartons would be able to appeal all three orders. This is, however, apparently not necessarily the case with regard to the February 25 and July 7 orders.

In *Akin v. PAFEC Ltd.*, 991 F.2d 1550 (11th Cir. 1993), a plaintiff-appellant sought to challenge on appeal both a grant of the defendant's motion for summary judgment and a denial of the plaintiff's jury demand. The Eleventh Circuit held that, while it had jurisdiction over the grant of summary judgment, it did not have jurisdiction over the denial of the jury demand. The court explained at length as follows:

"On appeal, the Akins also seek to challenge the district court's denial of their motion to make an untimely jury demand. *See* Fed.R.Civ.P. 39(b). The Akins assert that the district court abused its discretion in denying their motion to make an untimely jury demand because the court failed to discuss all of the factors that this Circuit has identified as relevant to the district courts' disposition of Rule 39(b) motions. *See Parrott v. Wilson*, 707 F.2d 1262, 1267 (11th Cir.), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983). We conclude that this issue is not properly before us at this juncture in the proceedings because the district court's ruling on the jury demand issue bears no relation to the final judgment which forms the basis of our appellate jurisdiction.

"This Court has jurisdiction to review a district court's non-final orders only when those orders merge into a final judgment of the district court. *See* 28 U.S.C.A. § 1291 (West Supp.1992); *Osterneck v. E.T. Barwick Indus., Inc.*, 825 F.2d 1521, 1530 (11th Cir. 1987). When a district court enters a final judgment, "all prior non-final orders and rulings which produced the judgment" are merged into the judgment and subject to review on appeal. *Barfield v. Brierton*, 883 F.2d 923, 930 (11th Cir. 1989). In this case, however, we do not believe the district court's rulings on the Akins' jury demand motions can be characterized as having "produced" the judgment now before us. Because the district court's grant of summary judgment for the defendants constituted a ruling that the Akins were not entitled to any trial at all, the jury issues raised by the entry of final judgment. Thus, the jury demand issues played no role in the entry of the final judgment before us, and [we] conclude that we do not have jurisdiction to review these issues at this stage in the

> proceedings. *Cf. U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1103 (9th Cir. 1985) (on review of final judgments, federal courts have jursidiction to review all interlocutory rulings "that may have affected the outcome of the proceedings in district court").

Id. at 1563 (footnotes omitted). This language from *Akin* appears to be equally applicable to the instant case.

The court, however, believes that it would be in the best interest of the parties that, should the Bartons decide to appeal this case, they should be allowed to appeal all issues. The February 25 and July 7 orders present novel and close questions of law and, should the appellate court remand this case for trial on the merits, these issues should not be left hanging. For example, it would be most unfortunate, after a remand, to put the parties through an expensive and time-consuming *nonjury* trial only to learn later on appeal that the trial should have been by *jury*. Moreover, as this court stated in a memorandum opinion entered this day, the Barton family has suffered a great tragedy. The court is sure that the Bartons would want to avoid, if at all possible, having to compound their distress by going through two trials. Accordingly, the court will certify the February 25 and July 7 orders for appeal pursuant to 28 U.S.C.A. § 1292(b). Of course, under § 1292(b), the Bartons have only *10 days* from the date of this order to seek permission in the Eleventh Circuit to appeal.*

*** Admittedly, it appears that *Akin* court could have exercised pendent appellate jurisdiction over the jury demand issue.**

> **"We also decline any invitation to review the jury demand issue pursuant to our pendent appellate jurisdiction. *See Schmelz v. Monroe County*, 954 F.2d 1540, 543 (11th Cir. 1992); *Stewart v. Baldwin County Bd. of Education*, 908 F.2d 1499, 1509 (11th Cir. 1990). The Akins' challenge to the district court's denial of their motion is subject to harmless error analysis. *See Howard*, 807 F.2d at 1566. We cannot assess**

It is therefore ORDERED and DECLARED, pursuant to 28 U.S.C.A. § 1292(b), that the orders entered on February 26 and July 7, 1993, involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the orders may materially advance the ultimate termination of this litigation.

DONE, this the 9th day of July, 1993.

/s/ [Illegible]
United States District Judge

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whether any error in denying the Akins' jury demand was harmless until after trial. For example, should the Akins' evidence be insufficient to withstand a motion for a directed verdict, the district court's denial of their jury demand would be harmless. *See id.* Because we cannot predict whether any error in the district court's handling of the Akins' motion will ultimately prove harmless, we decline to exercise our discretion to consider the Akins' objections to the court's ruling at this time. *See Crymes v. DeKalb County, Ga.*, 923 F.2d 1482, 1485 (11th Cir. 1991) (whether pendent appellate jurisdiction would be appropriate in a particular case is within appellate court's discretion); *Brown v. New Orleans Clerks and Checkers Union*, 590 F.2d 161, 165 (5th Cir. 1979) (appellate court may decline to exercise pendent appellant jurisdiction where further proceedings may render a decision on the question presented unnecessary)."

Id. at 1563-64 (footnotes omitted). However, in order to assure the greatest likelihood of appellate review of all issues, the court will certify the February 25 and July 7 orders pursuant to § 1292(b).

[Filed Jul. 9, 1993]

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 91-T-1001-S

R. A. BARTON, *et al.*,
Plaintiffs,

v.

AMERICAN RED CROSS, *et al.*,
Defendants.

ORDER

Upon consideration of the motion to bifurcate trial and the motions in limine to exclude evidence of Federal Food and Drug Administration Investigations, filed by defendants American Red Cross and Dr. Eoline McGowan, M.D., on February 24 and April 22, 1993, it is ORDERED that the motions are denied as moot.

It is ORDERED that the motion to amend witness list and the motion to reopen discovery, filed by plaintiffs on July 7, 1993, are denied as moot.

It is further ORDERED that the motions to allow the filing of additional data and the motion for consideration of additional material, filed by plaintiffs on April 9, 15, and 28, 1993, are granted.

Finally, United States Magistrate Judge Coody having informed the court that, in light of the final disposition of the litigation, the following motions are now moot, it is ORDERED that the motions are denied: motion

to intervene, filed by Edward Wayne Stringfellow, et al., on March 30, 1993; and motions to compel, filed by plaintiffs on February 3 and 22, 1993.

With this order, the court should have disposed of all remaining pending motions.

DONE, this the 9th day of July, 1993.

/s/ [Illegible]
United States District Judge

[Filed Jul. 7, 1993]

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 91-T-1001-S

R. A. BARTON, *et al.*,
Plaintiffs,

v.

AMERICAN RED CROSS, *et al.*,
Defendants.

ORDER

Plaintiffs R.A. Barton and her husband and two sons charge that defendants American Red Cross and Eoline McGowan, M.D., violated the Alabama Medical Liability Act (AMLA), Ala. Code 1975 §§ 6-5-480 to -488, 6-5-540 to -522, by negligently and wantonly failing to screen properly for HIV-infected blood that was given to Mrs. Barton in a transfusion. The Bartons also bring two other state law claims, for fraudulant concealment and the tort of outrageous conduct.[1] This cause is now before the court on the Red Cross's motion to strike the Bartons' jury demand. For the reasons set forth below, the Red Cross's motion is granted.[2]

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[1] Pursuant to 36 U.S.C.A. § 2, the federal courts have original jurisdiction over all cases to which the Red Cross is a party. *See American National Red Cross v. S.G.*, —— U.S. ——, ——, 112 S.Ct. 2465, 2472 (1992).

[2] The procedural history and factual allegations of this case are set forth in detail in an earlier order dated September 29, 1992. *Barton v. American Red Cross*, 804 F. Supp. 1455 (M.D. Ala. 1992).

The Red Cross contends that, as a federally chartered instrumentality, 36 U.S.C.A. §§ 1, et seq., it has the same sovereign immunity from trial by jury as the United States. There is no seventh amendment right to a jury trial in suits against the United States. *Lehman v. Nakshian,* 453 U.S. 156, 160, 101 S.Ct. 2698, 2701 (1981). The Red Cross maintains, therefore, that, unless Congress has expressly waived this immunity, it is immune from trial by jury.

The court must first decide whether the Red Cross enjoys sovereign immunity. Previously, in finding that the Red Cross is a "federal instrumentality" for purposes of immunity from state taxation, the Supreme Court wrote that the Red Cross enjoys the "status" of being "virtually . . . an arm of the Government." *Department of Employment v. United States,* 385 U.S. 355, 259-60, 87 S.Ct. 464, 467 (1966). The Bartons claim that, although the Red Cross enjoys the above status and has immunity from state taxation, it is not otherwise entitled to sovereign immunity. They argue that the fact that an entity is a federal instrumentality clothed with sovereign immunity for one purpose does not mean that it is a federal instrumentality for another purpose.

For example, the Ninth Circuit Court of Appeals held that the Red Cross is not a federal agency within the meaning of the Freedom of Information Act, 5 U.S.C.A. § 552, *Irwin Memorial Blood Bank v. American National Red Cross,* 640 F.2d 1051 (1981), but is one for state tax purposes, *United States v. Spokane,* 918 F.2d 84, 88 (9th Cir. 1990), *cert. denied,* —— U.S. ——, 111 S.Ct. 2888 (1991); *see also Department of Employment,* 385 U.S. at 358-61, 87 S.Ct. at 467-68. In *Spokane,* the court explained this difference in treatment by stating:

> "What we did decide [in *Irwin*] was that given the purposes and the background of the Freedom of Information Act, the Red Cross was not an agency within the meaning of that statute. To extrapolate from that holding to the area of the

> law which we must deal with here would be a serious logical and semantic error."

918 F.2d at 88. The court explained the fallacy of insisting "that a word which has a meaning in one context must have the selfsame meaning when transplanted to an entirely different context." *Id.* Relying on this distinction, the Bartons argue that, although the Red Cross may be a federal instrumentality entitled to sovereign immunity for purposes of taxation, *Department of Employment,* 385 U.S. at 358-61, 87 S.Ct. at 467-68, and punitive damages, *Barton v. American Red Cross,* —— F. Supp. —— (M.D. Ala. Feb. 25, 1993), it is not, for example, entitled to sovereign immunity for purposes of the Federal Tort Claims Act (FTCA) 28 U.S.C.A. §§ 1346(b), 2402, 2671-2680, or, more specifically, for purposes of jury trial.[3]

Assuming that an entity may be a federal instrumentality with sovereign immunity for one purpose and not for another, the court remains convinced that the Red Cross is entitled to the same immunities from litigation as those enjoyed by the federal government, including immunity from trial by jury. In *Lehman,* the Supreme Court explained that it is not difficult to understand why Congress would be reluctant to provide for jury trials against the United States: that juries might be overly generous because of the virtually unlimited ability of the government to pay the verdict. 453 U.S. at 161 n.8, 101 S.Ct. at 2702 n.8. In *Department of Employment,* the Supreme Court explained that "Congress chartered the present Red Cross in 1905, subjecting it to governmental supervision and to a regular financial audit by the Defense . . . Department," *id.* at 360, 87 S.Ct. at 467 (cita-

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[3] The Bartons have assumed that the Red Cross is not a federal agency subject to the FTCA. The court does not reach whether this assumption has merit. *See Mendrala v. Crown Mortgage Co.,* 955 F.2d 1132, 1136 (7th Cir. 1992) (suggesting criteria for determining when an entity is a federal agency covered by the FTCA).

tion omitted); that "Its principal officer is appointed by the President, who also appoints seven (all government officers) of the remaining 49 Governors," *id.* (citation omitted); that "By statute and Executive Order there devolved upon the Red Cross the right and the obligation to meet this Nation's commitments under various Geneva Conventions, to perform a wide variety of functions indispensable to the workings of our Armed Forces around the globe, and to assist the Federal Government in providing disaster assistance to the States in time of need," *id.* (footnotes omitted); and that, "Although its operations are financed primarily from voluntary private contributions, the Red Cross does receive substantial material assistance from the Federal Government." *Id.* (footnote omitted). This court is convinced that the Red Cross is so intertwined with and essential to the operation of the federal government, both internationally and domestically, that litigation poses the same potential for interference with public administration to the Red Cross as it does to the federal government in general. As "virtually . . . an arm of the Government," *id.* the Red Cross faces a similar danger of overly generous verdicts from juries.[4] The Red Cross should be placed on a par with the federal government when it comes to the question of the extent to which the Red Cross should be open, or not open, to litigation.

This conclusion that the Red Cross enjoys an immunity beyond that of being shielded from state taxation is reinforced by the fact that, like the Tennessee Valley Authority (TVA) and many other federal instrumentalities, the Red Cross's charter contains a clause giving it "the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States." 36 U.S.C.A. § 2. This "sue and be sued" clause

[4] This is not to say that this danger is real, however. According to *Lehman*, Congress is concerned that it may be so, and this court believes that the same concern, founded or unfounded, arguably could be shared with regard to the Red Cross.

waives sovereign immunity. *See Loeffler v. Frank*, 486 U.S. 549, 554, 108 S.Ct. 1965, 1969 (1988). As other courts have explained, this clause "presumably would have been unnecessary had Congress intended to have the [instrumentality] treated as a private entity from its inception." *Young v. United States Postal Service*, 698 F. Supp. 1139, 1143 (S.D.N.Y. 1988), *mandamus denied, In re Young*, 869 F.2d 158 (2d Cir. 1989) (per curiam). In a case against the TVA, another court stated that the "TVA does enjoy sovereign immunity, as evidenced by the fact that Congress had to waive this immunity in order to allow suits against the TVA." *Jones-Hailey v. Corporation of TVA*, 660 F. Supp. 551, 553 (E.D. Tenn. 1987). Thus, the court must begin with the premise that the Red Cross has sovereign immunity as to trial by jury.[5]

The court must next determine whether the waiver of the Red Cross's sovereign immunity contained in the "sue and be sued" clause extends to waiver of immunity from jury trial. The Supreme Court has stated that "sue and be sued" waivers "should be liberally construed." *Federal Housing Admin. v. Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490 (1940). The Court explained that, "it must be presumed that when Congress launched a gov-

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[5] Another court, construing the sovereign immunity of the TVA, wrote:

> "TVA from its very creation has not enjoyed sovereign immunity, 16 U.S.C. § 831c(b), and has been subject to suit like any other private corporation. . . . The instant case is in the nature of a contract dispute, which traditionally and under the rules of the common law would bring into operation the Seventh Amendment right to a jury trial unless Congress in allowing a suit against TVA intended to deny a complaining party this right to jury trial."

Algernon Blair Indus. Contractors, Inc. v. Tennessee Valley Authority, 552 F. Supp. 972, 973-74 (M.D. Ala. 1982). Obviously, this court disagrees with the analysis of sovereign immunity in *Algernon Blair*.

ernmental agency into the commercial world and endowed it with authority to 'sue or be sued', that agency is not less amenable to judicial process than a private enterprise under like circumstances would be." *Id.* "Clearly the words 'sue and be sued' in their normal connotation," the Court continued, "embrace all civil process incident to the commencement or continuance of legal proceedings." *Id.* The Court has more recently reiterated that, "Encompassed within this liberal-construction rule is the principle 'that the words "sue and be sued" normally include the natural and appropriate incidents of legal proceedings.' " *Loeffler*, 486 U.S. at 555, 108 S.Ct. at 1969 (quoting *Reconstruction Finance Corp. v. J.G. Menihan Corp.*, 312 U.S. 81, 85, 61 S.Ct. 485, 487 (1941)). Thus, the issue is whether the right to a jury trial is a natural and appropriate incident of legal proceedings or, to put it another way, whether the denial of a jury trial would make the Red Cross less amenable to judicial process than a private enterprise.

The court agrees with the Red Cross's contention that the incidents of civil process waived by a "sue and be sued" clause include only those things necessary to commence and maintain a legal proceeding to permit full compensation. Although the right to a jury trial is certainly an important part of our legal system, it is not necessary to achieve full compensation in a legal proceeding. In *Young v. United States Postal Service*, the district court was confronted with the question of whether the clause in the Postal Reorganization Act that allows the United States Postal Service to "sue and be sued," 39 U.S.C.A. § 401(1), also subjects the Service to trial by jury. The district court pointed out that "striking plaintiff's jury demand would not render the Service less amenable to judicial process, or less subject to liability for its acts, than any other business." 698 F. Supp. at 1145. Similarly, the Red Cross will still be amenable to judicial process if no jury trial is allowed against it.

In unholding the district court in *Young*, the Second Circuit Court of Appeals wrote that, "While 'sue and be sued' clauses in federal statutes are indeed broad waivers of immunity and have subjected the federal government and its agencies to many types of liability and process, including prejudgment interest, liability for costs, and garnishment and attachment proceedings, the waiver of sovereign immunity does not, by itself, grant a right to trial by jury in an action against the federal government." *In re Young*, 869 F.2d at 159 (citations omitted). Similarly, although waivers of sovereign immunity should be liberally construed, the Red Cross's "sue and be sued" waiver should not be expanded to include the right to a jury trial absent some additional statutory language or legislative history that would support such an expansion.

In addition, in *Lehman*, the Supreme Court has specifically held that "the plaintiff in an action against the United States has a right to trial by jury only where Congress has *affirmatively* and *unambiguously* granted that right by statute." 453 U.S. at 168, 101 S.Ct. at 2705 (emphasis added). The Court explained that "When Congress has waived the sovereign immunity of the United States, it has almost always conditioned that waiver upon a plaintiff's relinquishing any claim to a jury trial." *Id.* at 161, 101 S.Ct. at 2702. Therefore, "if Congress waives the Government's immunity from suit, . . . the plaintiff has a right to a trial by jury only where that right is one of 'the terms of [the Government's] consent to be sued.' " *Id.* at 161, 101 S.Ct. at 2701 (quoting *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953 (1976). The Red Cross's charter, 36 U.S.C.A. §§ 1, et seq., contains no express provision waiving its immunity from jury trial. As explained above, the "sue and be sued" clause in the charter only waives immunity for the normal incidents of civil process. The parties have not pointed to any legislative history addressing the right to a jury trial in a suit against the Red Cross. Accordingly, the Red Cross's immunity from trial by jury has not been waived.

Finally, the Bartons argue that the Red Cross's motion to strike the jury demand was untimely filed. Although the Bartons claim that, if the motion to strike is granted. their case preparation will be confused, the court ascertains no prejudice to the Bartons. Certainly, the Bartons will not have to make any additional preparations for a bench trial. If anything, a jury trial requires slightly more preparation. In addition, at the time the Red Cross filed its motion to strike the jury demand, the trial date had not been set.

Accordingly, for the above reasons, it is ORDERED that defendant American Red Cross's February 24, 1993 motion to strike plaintiffs' demand for trial by jury is granted.

DONE, this the 7th day of July, 1993.

/s/ Illegible
United States District Judge

[Filed Feb. 25, 1993]

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

R. A. BARTON, *et al.*,
Plaintiffs,

v.

AMERICAN RED CROSS, *et al.*,
Defendants.

ORDER

Plaintiffs R. A. Barton and her husband and two sons charge defendants American Red Cross, Eoline McGowan, M.D., Southeast Alabama Medical Center and John P. Moore, Jr., M.D., with negligent and wanton failure to screen properly for HIV-infected blood that was given to Mrs. Barton in a transfusion. The Bartons seek relief under the Alabama Medical Liability Act (AMLA), Ala. Code 1975 § 6-5-542, and assert claims for compensatory and punitive damages. The Bartons filed their suit in the Circuit Court of Houston County, Alabama. The state court granted a motion to dismiss filed by the Medical Center and Dr. Moore on statute-of-limitations grounds on August 22, 1991. Later that day, the Red Cross and Dr. McGowan removed the case to federal court. This cause is before the court on several motions. Plaintiffs move to reinstate the Medical Center and Dr. Moore as defendants. The Medical Center and Dr. Moore oppose the motion to reinstate, but in the event they are reinstated they object to this court's jurisdiction over them and move to remand the case to state court. In an unrelated motion, the Red Cross moves to strike plaintiffs' claim for punitive damages. For the reasons set forth

below, plaintiffs' motion to reinstate is denied, the Medical Center's and Dr. Moore's motions to remand are denied as moot, and the Red Cross's motion to strike is granted.

I. BACKGROUND

On July 24, 1988, the Southeast Alabama Medical Center in Dothan, Alabama admitted Mrs. Barton for treatment by Dr. Moore. The hospital gave Mrs. Barton a transfusion with blood taken from a donor provided by the American Red Cross. Dr. Eoline McGowan was responsible, at least in part, for supervising the Red Cross's procedures for screening blood from volunteer donors in 1988 in Alabama. On June 9, 1990, the Red Cross discovered that the donor whose blood had been used in Mrs. Barton's transfusion had tested positive for HIV. The Red Cross did not notify the Medical Center of the donor's HIV status until December 13, 1990.

Dr. Moore informed Mrs. Barton on January 3, 1991, that the blood donor had tested positive for HIV. Mrs. Barton took a blood test and was informed by Dr. Moore on January 8 that her blood tested positive for HIV. However, Dr. Moore also told her that false positives were possible and that the results could not be considered final until a California laboratory conducted a more sophisticated test, known as a "Western blot" test. It is unclear precisely when Mrs. Barton was informed of the results of the Western blot test. A report by the Alabama Reference Laboratory, dated January 12, 1991, states that the results of the Western blot test "should be available within 7 days." A letter from another physician, Dr. Coe, to Dr. Moore, dated January 23, 1991, states: "As we have discussed, [Mrs. Barton] is, indeed, HIV positive confirmed with Western blot study." Mrs. Barton alleges that she could not have learned of the Western blot test results earlier than January 20 and believes that Dr. Coe's office orally informed her of the results on January 22, 1991.

Mrs. Barton filed suit against the Red Cross, Dr. McGowan, the Southeast Alabama Medical Center, and Dr. Moore on July 18, 1991, in the Circuit Court of Houston County, Alabama. On August 22, the state court granted a motion to dismiss filed by the Medical Center and Dr. Moore on statute-of-limitations grounds. Also on August 22, the Red Cross and Dr. McGowan removed the case to federal court. These two defendants then moved for summary judgment on the grounds that the doctrines of issue and claim preclusion barred the Bartons' claims and also that the AMLA's statute of limitations barred the Bartons' claims. On September 29, 1992, this court denied the motion for summary judgment, finding that the state court's order dismissing the Medical Center and Dr. Moore was not a final order under the Alabama Rules of Civil Procedure and therefore neither issue preclusion nor claim preclusion applied. *Barton v. American Red Cross*, 804 F. Supp. 1455, 1457-58 (M.D. Ala. 1992). Based on Mrs. Barton's deposition and affidavit testimony taken after the case was removed, the court found that it is a question of fact for the jury as to when Mrs. Barton discovered her cause of action under AMLA'c provision allowing suit to be filed within six months of discovery of a cause of action. *Id.* at 1461-62. Subsequently, the parties filed the motion now before the court. The Red Cross filed its motion to strike on December 8, 1992, plaintiffs filed their motion to reinstate on December 14, 1992, and the Medical Center and Dr. Moore filed their motion to remand on January 11, 1993.

II. REINSTATEMENT

Under the AMLA, an action must be brought within two years after the act giving rising to the claim. As explained in this court's September 29, 1992 opinion, plaintiffs filed their suit outside of the two-year period. However, if a cause of action could not reasonably have been discovered within the two-year period, the AMLA allows a suit to be brought within six months from the

date of discovery of a cause of action or the date of discovery of facts which would reasonably lead to discovery of the cause of action. Mrs. Barton filed her suit on July 18, 1991. Thus, if Mrs. Barton discovered her cause of action before January 18, 1991, the filing of her suit would not be within AMLA's six-month descoverey period. Plaintiffs claim that the state court erred in finding that the statute of limitations barred the action because there is a genuine issue of material fact for the jury as to when Mrs. Barton discovered her cause of action. Dr. Moore and the Medical Center claim that reinstating them would be unfair because: (1) plaintiffs did not make this date-of-discovery argument before the state court; and (2), once the state court dismissed them, plaintiffs waited 16 months to move for reinstatement.

Although plaintiffs style their motion as one to "reinstate" defendants Moore and the Medical Center, the motion is really a request for reconsideration of the state court's dismissal of Dr. Moore and the Medical Center on statute-of-limitations grounds. In cases involving reconsideration of a final judgment, Rule 60(b) of the Federal Rules of Civil Procedure lists a number of reasons for allowing relief. Although the state court's order was not a final judgment, the reasons listed in Rule 60(b) are a useful guide here. The reasons include newly discovered evidence which by due diligence could not have been discovered before the final judgment; and fraud, misrepresentation or other misconduct of an adverse party. Furthermore, on a motion to reconsider, a court ordinarily will not hear evidence that was within the moving party's knowledge at the time of the intial decision. *See DeBruyne v. Equitable Life Assurance Society of the United States,* 920 F.2d 457, 471 (7th Cir. 1990).

Before the state court, plaintiffs admitted that on January 3, 1991, Dr. Moore informed Mrs. Barton that the donor whose blood had been used in her transfusion had tested positive for HIV. In their motions to dismiss,

Dr. Moore and the Medical Center argued that Mrs. Barton discovered her cause of action on January 3. Plaintiffs' plea of estoppel before the state court mentioned that Mrs. Barton took a test to confirm that she was HIV positive and that the "report on her test was transmitted to her on or about January 19, 1991." Nevertheless, plaintiffs did not argue that Mrs. Barton discovered her cause of action on January 19. Instead, plaintiffs solely argued that Dr. Moore and the Medical Center should be estopped from raising the statute of limitations defense because they induced Mrs. Barton to delay filing her suit by suggesting they would settle out-of-court. Plaintiffs made no assertion concerning the date on which Mrs. Barton discovered her cause of action. The other evidence concerning the need for a "Western blot" test to confirm that Mrs. Barton was HIV positive was not presented. Having no other argument before it, the state court concluded that the Medical Center and Dr. Moore were not estopped from pursuing their statute of limitations defense and that that the defense barred plaintiffs' claim. The plaintiffs have not shown—and, indeed, have not argued —that the state court incorrectly decided the narrow issue before it. Therefore, this court will be reluctant to reconsider a court's finding that was correct based on the evidence before it.

In response to the motion for summary judgment based on the statute of limitations filed in this court by Dr. McGowan and the Red Cross, plaintiffs presented Mrs. Barton's affidavit testimony, taken after the case was removed, that Mrs. Barton did not receive test results confirming that she was HIV positive until January 20, at the earliest. Therefore, plaintiffs argued, Mrs. Barton did not learn of sufficient facts that would lead to the discovery of her cause of action until that date. Plaintiffs have not explained why they failed to make this argument before the state court. Certainly, most of the facts concerning the date on which Mrs. Barton discovered her cause of action were within Mrs. Barton's knowledge. Thus, ab-

sent a reasonable explanation, which plaintiffs have not put forth, the court will not consider Mrs. Barton's affidavit testimony in determining the motion to reinstate.

Nor do plaintiffs allege that any of the defendants prevented them from asserting the date-of-discovery argument before the state court by failing to disclose relevant information. Plaintiffs do claim that defendants fraudulently concealed for six months the knowledge that the blood donor was HIV positive and that plaintiffs did not discover this fraudulent concealment until February 1992. Lack of knowledge of the fraudulent concealment claim, however, would not have prevented plaintiffs from asserting a date-of-discovery claim before the state court.

Plaintiffs' failure to bring these matters before the state court possibly would be excusable if plaintiffs had moved for reinstatement in a reasonable time after the state court's order. Plaintiffs, however, waited 16 months to move to reinstate Dr. Moore and the Medical Center. Even if plaintiffs had not developed the date-of-discovery argument at the time of the state court dismissal, plaintiffs knew of it by February 28, 1992, when they filed their response to Dr. McGowan and the Red Cross's summary judgment motion. Nevertheless, plaintiffs still waited over nine months from that date to move to reinstate.

Plaintiffs claim that they moved to reinstate within a reasonable time because no avenue was available to challenge the state court's order of dismissal until this court decided Dr. McGowan and the Red Cross's summary judgment motion, which raised the issue whether the state court's order was a final judgment. Plaintiffs are incorrect. Once the case was removed to this court on August 22, 1991, plaintiffs could have brought a motion to reconsider in this court. Ultimately, this is the avenue that the plaintiffs used. Although the issue of the finality of the state court's judgment was at issue in the Red Cross's summary judgment motion, that did not preclude plain-

tiffs from bringing a motion to reinstate. The issue of finality would simply have been at issue in both motions. Furthermore, even if plaintiffs correctly waited until the court decided the summary judgment motion, plaintiffs have failed to explain why they waited an additional two and a half months to file the motion to reinstate once the summary judgment motion was decided.

The Eleventh Circuit has described Rule 60(b)(6), which allows relief from a final judgment for "any other reason justifying relief from the operation of the judgment," as a " 'catch-all provision,' and a 'grand reservoir of equitable power to do justice in a particular case.' " *Nisson v. Lundy*, 975 F.2d 802, 806 (11th Cir. 1992) (per curiam) (quoting *Compton v. Alton Steamship Co.*, 608 F.2d 96, 106-07 (4th Cir. 1979)). The equities here, however, weigh in favor of denying the motion to reinstate. Plaintiffs have failed to explain why they did not bring the date-of-discovery issue to the attention of the state court and why they delayed seeking reconsideration of the state court's order in this court. Plaintiffs have not presented any other reasons why justice would require granting the motion to reinstate. Accordingly, plaintiffs' motion to reinstate is denied.

III. REMAND

The Medical Center and Dr. Moore have also filed motions to remand this cause to state court. Because the court has denied plaintiffs' motion to reinstate, the court need not reach issue of remand.

IV. PUNITIVE DAMAGES

The Red Cross contends that it is a federal instrumentality and, as such, is immune from any claims for punitive damages. Plaintiffs concede that the Red Cross is a federal instrumentality. *See Department of Employment v. United States*, 385 U.S. 355, 358-60, 87 S.Ct. 464, 466-68 (1966). Plaintiffs also concede that as a general rule,

a federal instrumentality has the same immunity from penalties as the United States and therefore is immune from claims for punitive damages in the absence of an express Congressional provision permitting such damages. *See Missouri Pac. R.R. Co. v. Ault*, 256 U.S. 554, 563-65, 41 S.Ct. 593, 597 (1921); *Smith v. Russellville Prod. Credit Ass'n*, 777 F.2d 1544, 1549-50 (11th Cir. 1985).

Nevertheless, plaintiffs argue that, for public policy reasons, the Red Cross should not receive immunity for claims for punitive damages. In *Smith*, the Eleventh Circuit held that federally chartered production credit associations (also known as PCAs), despite being privately organized, owned and operated corporations, remained federal instrumentalities. *Id.* at 1550. The court stated:

> "Although punitive damages awards against PCAs would not be paid out of the federal treasury, such awards would interfere with public administration. PCAs fulfill a government mission of channeling credit primarily to farmers. Punitive damages would have to be paid from money that could otherwise be targeted to financing tractor equipment purchases, land expansion, or supply needs. The government's purposes in establishing the PCAs would thus be undercut."

Id. (citation omitted). Another court has applied this rationale to the Red Cross, finding that

> "the Red Cross fulfills a government mission of providing a supply of blood to citizens in need. Punitive damages would have to be paid from money that could otherwise be targeted to promoting the cause of the Red Cross—that of encouraging donors to give, and collecting and distributing blood to those in need."

Doe v. American Nat'l Red Cross, No. 91-03-CIV-3-BR (E.D.N.C. Jan. 30, 1992).

Plaintiffs maintain that the PCAs' function, which is to channel credit to farmers, cannot be compared with the Red Cross's function, which is to obtain and supply blood. According to plaintiffs, the Red Cross's function also includes a public health and safety responsibility to ensure that the blood it supplies is not contaminated. Plaintiffs claim that the Red Cross failed to exercise due care in screening the blood given to Mrs. Barton and then waited for six months to inform her that she was given HIV-infected blood. The availability of punitive damages, according to plaintiffs, would deter the Red Cross from acting in a manner that jeopardizes its mission to provide safe blood. Plaintiffs suggest that the need for protection of the public welfare must be balanced against the need of the Red Cross to conduct its business. Accordingly, plaintiffs contend that federal instrumentalities that have a responsibility for public health and safety should be excepted from the usual federal government immunity for claims for punitive damages.

Despite plaintiffs' attempt to carve out a public health and safety exception to federal instrumentality immunity for punitive damage claims, the court finds no basis for such an exception. If Congress thought it appropriate to exempt a particular instrumentality from punitive damage immunity, it could do so in that instrumentality's charter. Otherwise, neither the courts nor Congress have expressed the need for public health and safety exception that would apply generally. Indeed, the Federal Tort Claims Act, which waives sovereign immunity under certain circumstances for torts committed by government employees, specifically precludes recovery for punitive damages, 28 U.S.C.A. § 2674, yet makes no exception for government employees responsible for the public health and safety. Similarly, the court finds no basis for plaintiffs' suggestion that the need for protection of the public welfare must be balanced against the need of a federal instrumentality to conduct its business.

Accordingly, for the above reasons, it is ORDERED:

(1) That plaintiffs' motion to reinstate defendants Southeast Alabama Medical Center and John P. Moore, Jr., M.D., filed on December 14, 1992, is denied; and

(2) That the motions to remand by defendants Southeast Alabama Medical Center and John P. Moore, Jr., M.D., filed on January 11, 1993, are denied as moot; and

(3) That the motion by defendant American Red Cross to strike plaintiffs' claims for punitive damages, filed on December 8, 1992, is granted.

DONE, this the 25th day of February, 1993.

/s/ Illegible
United States District Judge

[Filed Mar. 23, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-7105 and 94-6135

R.A. BARTON; J.R. BARTON, SR.; J.R. BARTON, JR.;
and BLAKE BARTON,
Plaintiffs-Appellants,

versus

AMERICAN RED CROSS, a corporation,
EOLINE MCGOWAN, in individual,
Defendants-Appellees,

SOUTHEAST ALABAMA MEDICAL CENTER, a corporation;
JOHN P. MOORE, JR., M.D., an individual,
Defendants.

On Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: KRAVITCH, Circuit Judge, GODBOLD and RONEY, Senior Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active

service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

[Filed Dec. 15, 1993]

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 91-T-1001-S

R. A. BARTON, *et al.*,
Plaintiffs,

v.

AMERICAN RED CROSS, *et al.*,
Defendants.

ORDER

Upon consideration of the recommendation of the United States Magistrate Judge entered on November 22, 1993, and after an independent review of the file, it is ORDERED:

(1) That the objections filed by the plaintiffs on December 6, 1993, are overruled;

(2) That the recommendation of the United States Magistrate Judge filed on November 22, 1993, is adopted;

(3) That the motion to alter, amend, or vacate judgment, etc., filed by plaintiffs on July 23, 1993, is denied;

(4) That the motion for relief, etc., filed by plaintiffs on November 22, 1993, is denied; and

(5) That the motion for final judgment filed by defendants on November 12, 1993, is denied as moot.

It is further ORDERED that the renewed motion to compel filed by plaintiffs on December 6, 1993, is denied.

It is further ORDERED and DECLARED, pursuant to 28 U.S.C.A. § 1292(b), that the orders entered on February 25 and July 7, 1993, involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the orders may materially advance the ultimate termination of this litigation.

DONE, this the 15th day of December, 1993.

/s/ [Illegible]
United States District Judge

[Filed Nov. 22, 1993]

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 91-T-1001-S

R. A. BARTON, *et al.*,
Plaintiff,

v.

AMERICAN RED CROSS, *et al.*,
Defendants.

RECOMMENDATION OF THE MAGISTRATE JUDGE

Pending before the court is the defendants' November 12, 1993, motion for entry of final judgment and the plaintiffs' July 23, 1993, motion to alter, amend, or vacate judgment, related orders and findings. Consideration of the latter motion was deferred by the court in an August 19, 1993, order which referred discovery motions to the Magistrate Judge. Thereafter, upon the agreement of the parties, the court appointed counsel for the express purpose of attempting to conduct discovery from the donor in a confidential manner. Counsel was provided the name of the donor and available information about the donor's last known address. Attempts to locate or contact the donor have been unsuccessful. Appointed counsel did contact a relative of the donor who indicated she has infrequent contact with the donor. This relative was asked in writing to inform the donor that the donor should contact appointed counsel. Nonetheless, it appears to the court that it is highly unlikely that

the donor gratuitously will become involved in this pending matter. The court has been extremely lenient in allowing plaintiffs every opportunity to pursue contact with and discovery from the donor. In the judgment of the court, the plaintiff has had adequate, indeed ample, opportunity for discovery from the donor. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Florida Power & Light Company v. Allis Chalmers Corporation,* 893 F.2d 1313 (11th Cir. 1990) (District court may grant summary judgment so long as parties have had adequate time for discovery). The law does not grant litigants unlimited time for discovery. At this time in this litigation, the court concludes it is pure speculation to assert that more time will yield evidence which compels a different result. It is time for resolution of this litigation. Thus, the court concludes that the plaintiffs' motion to alter, amend, or vacate judgment, related orders and findings be denied. The court further concludes that upon denial of the plaintiffs' motion, the defendants' motion for entry of final judgment should be denied as moot.

Accordingly, it is the RECOMMENDATION of the Magistrate Judge that the plaintiff's July 23, 1993, motion to alter, amend, or vacate judgment, related orders and findings be denied and that the defendants' motion for entry of final judgment be denied as moot.

Done this 22nd day of November, 1993.

/s/ Charles S. Coody
CHARLES S. COODY
United States Magistrate Judge

Civil Action No. 91-T-1001-S

ORDER

The Clerk of the Court is ORDERED to file the Recommendation of the Magistrate Judge and to serve by mail a copy thereof on the parties to this action. The parties are DIRECTED to file any objections to the said Recommendation within a period of 13 days from the date of mailing to them. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a de novo determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright,* 677 F.2d 404 (5th Cir. 1982). *See Stein v. Reynolds Securities, Inc.,* 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981, *en banc*), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Done this 22nd day of November, 1993.

/s/ Charles S. Coody
CHARLES S. COODY
United States Magistrate Judge

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Supreme Court, U.S.
FILED
JUL 21 1995
CLERK

No. 94-2091

In The

Supreme Court of the United States

October Term, 1994

R.A. BARTON; J.R. BARTON, JR. and BLAKE BARTON,

Petitioners,

vs.

AMERICAN RED CROSS and EOLINE McGOWAN, M.D.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming the grant of summary judgment in favor of the Red Cross and Dr. McGowan based upon application of Alabama law.

2. Whether the court of appeals erred in affirming the district court's decision allowing more than three months for petitioners to conduct donor discovery.

3. Whether, despite the existence of adequate and independent grounds under Alabama law for the court of appeals' decision affirming summary judgment, this Court should render an opinion as to the scope of the Red Cross' immunity from punitive damages and trial by jury (rather than bench trial) where such opinion would not change the final judgment in this case.

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Respondents, the American Red Cross and Dr. Eoline McGowan, respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit.

REASONS FOR DENYING THE WRIT

No constitutional principal or important issue of federal law is implicated in this case. As petitioners concede, (Petitioners' Brief at 10-15), this action is governed by Alabama law. The summary judgment decision in favor of the Red Cross and Dr. McGowan is not based or dependent upon federal law. Likewise, the lower courts' decisions with regard to the amount of time permitted to conduct donor discovery raise no important issue of federal law; such decisions are committed to the sound discretion of the district court. While the scope of the Red Cross' immunity from punitive damages and trial by jury (rather than bench trial) is arguably an important federal question, the presence of adequate and independent state law grounds for affirming summary judgment makes review by this Court inappropriate. The same judgment would still be required under Alabama law regardless of this Court's ruling on the immunity issues.

I.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF THE RED CROSS AND DR. MCGOWAN BASED UPON A PROPER APPLICATION OF ALABAMA LAW.

This case is a straightforward tort action governed by Alabama law and arising from petitioner R. A. Barton's infection with HIV as a result of a blood transfusion administered in July 1988. It was litigated in federal court solely because the Red

Cross is entitled to a federal forum. *See* 36 U.S.C. § 2; *see also American National Red Cross v. S.G.*, 112 S. Ct. 2465 (1992).

It is undisputed that the Red Cross tested the blood transfused to R. A. Barton for the presence of antibodies to HIV, the virus that causes AIDS, using the state-of-the-art ELISA test and that the results of that test were negative. (Petitioners' Brief at 9). It is also undisputed that no test for HIV is one hundred percent effective and that screening tests cannot detect HIV antibodies until several days (or weeks) after infection. (*Id.*). It is against this factual background that petitioners' claims that the Red Cross' blood testing, donor screening, and lookback notification practices were negligent must be assessed.

In a comprehensive opinion, the district court carefully considered and squarely rejected each of petitioners' claims, and the Eleventh Circuit Court of Appeals affirmed on all grounds. Specifically, the district court held that petitioners' donor screening, blood testing, and lookback notification claims were governed by the Alabama Medical Liability Act ("AMLA"), Ala. Code §§ 6-5-540, *et seq.*, as interpreted by the Alabama Supreme Court. (App. 6a, 26a). *See also Wilson v. American Red Cross*, 600 So. 2d 216 (Ala. 1992). Applying the AMLA, the district court held that the Red Cross and Dr. McGowan were entitled to summary judgment on these claims for two independent reasons: 1) that petitioners' expert, Dr. Irving Schwartz, was not properly qualified as a "similarly situated health care provider," as required by Ala. Code § 6-5-548(a), to offer the opinion that the Red Cross failed to exercise due care (App. 16a); and 2) that, even if Dr. Schwartz had been qualified, his testimony failed to raise a disputed issue of material fact as to whether the Red Cross complied with the appropriate standard of care because he failed to opine that the Red Cross engaged in *any* negligent act. (App. 17a-24a).

Nowhere do petitioners explain why the lower courts' decisions on these state law questions warrant review by this Court. Instead, petitioners baldly argue that, notwithstanding the failure of their own expert even to opine that the Red Cross was negligent, Alabama law requires a different result. Moreover, petitioners' discussion of Alabama law is defective. It conspicuously omits the most relevant authority in this area — the Alabama Supreme Court's holding in *Wilson v. American Red Cross*, 600 So. 2d 215 (Ala. 1992) that claims against the Red Cross for transfusion-related infections are governed by the AMLA. Both the district court and the Eleventh Circuit — experts in Alabama law — rejected precisely the arguments now advanced by petitioners, and there is no reason for this Court to expend scarce judicial resources to second-guess the lower courts on these matters of Alabama law.[1] *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982) (individual courts of appeal are "in a better position than we are to recognize any special nuances of state law").

II.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DECISION ALLOWING PETITIONERS MORE THAN THREE MONTHS TO CONDUCT DONOR DISCOVERY.

Petitioners assert that the lower courts are "sharply divided upon the question of discovery from a blood donor in cases such as this." (Petitioners' Brief at 21). However, the propriety of

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1. Petitioners' claims that the Red Cross fraudulently suppressed information that the blood donor in this case was HIV positive and that this constituted outrageous conduct under Alabama law (Question Presented 4) are similarly meritless. Applying Alabama law, the district court below rejected these claims on the grounds that there was no evidence that the Red Cross' conduct was unreasonable, much less that it was intentional or sufficiently reckless to constitute the tort of outrage under Alabama law. (App. 25a-35a).

donor discovery is not the question before this Court, because here the district court *allowed* donor discovery. The only question presented is whether the district court permitted sufficient time for such discovery.

Matters such as the timing for the completion of discovery are committed to the sound discretion of the district court, and "[d]iscovery rulings will not be disturbed unless the district court has abused its discretion and such abuse has resulted in substantial harm to the party seeking relief." *Arabian American Oil Co. v. Scarfone*, 939 F.2d 1472, 1477 (11th Cir. 1991). As the Eleventh Circuit found, there was no abuse of discretion here and certainly no prejudice to the petitioners. The district court made every effort to accommodate the petitioners, permitting donor discovery to go forward even after it had granted the Red Cross' motion for summary judgment. Petitioners' complaint that the district court should have granted additional extensions of the donor discovery deadline beyond those it did permit must be rejected, especially considering the petitioners' own admission that "efforts to locate the donor produced no results." (Petitioners' Brief at 22).[2] Petitioners' speculation that further efforts might have been more successful provides no basis for discretionary review in this Court.

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2. Donor discovery typically is designed to determine if a male donor was homosexual and might have been eliminated by different screening questions regarding his sexual activities. Because the donor here was a female, it is highly unlikely that donor discovery would have helped the petitioners in any event.

III.

BECAUSE ALABAMA LAW PROVIDES ADEQUATE AND INDEPENDENT BASES FOR SUMMARY JUDGMENT, NO DECISION REGARDING THE SCOPE OF THE RED CROSS' IMMUNITY FROM PUNITIVE DAMAGES OR TRIAL BY JURY IS APPROPRIATE AT THIS TIME.

As noted above, Alabama tort law governs whether the district court's grant of summary judgment in favor of the Red Cross and Dr. McGowan was appropriate in this case. No decision regarding the scope of the Red Cross' immunity from punitive damages or trial by jury (rather than a bench trial) will change this. Because the same summary judgment would still be required under Alabama law even if the Court were inclined to reverse the lower courts' decisions regarding the Red Cross' immunity, this Court's "review could amount to nothing more than an advisory opinion." *Michigan v. Long*, 463 U.S. 1032, 1042 (1983) (*quoting Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)). Thus, although interpretation of the scope of immunity conferred by the Red Cross' charter may present a federal question worthy of this Court's review at some point, that question is not properly before the Court at this time.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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